THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:96CV01285 (RCL)
	)	
BRUCE BABBITT, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

RECOMMENDATION AND REPORT OF THE SPECIAL MASTER

REGARDING THE DELAYED DISCLOSURE OF THE DESTRUCTION

OF UNCURRENT CHECK RECORDS

MAINTAINED BY THE DEPARTMENT OF THE TREASURY

(December 3, 1999)

INTRODUCTION

On May 11, 1999, Senior Counsel Phillip Brooks, United States Department of Justice, Environmental and Natural Resources Division (DOJ/ENRD), informed the Special Master about "the loss of documents at the Department of the Treasury." Ex. 1 at 1. In his letter of that date, Mr. Brooks explained that, "on January 27, 1999, Treasury Department personnel stopped the destruction of an undifferentiated document collection stored in the basement of the Hyattsville [Maryland] facility of Treasury Financial Management Service (FMS)." Id. The letter also recounted that, in 1996, a box of documents was "apparently mislaid" "when documents were transferred from FMS [Financial Management Services] to the Bureau of Public Debt." Id. at 2.

Following receipt of this letter, the Court charged the Special Master with investigating the events surrounding the disposition of these documents emphasizing the reasons why the Defendants waited more than three months to inform the Court of the destruction. The following Report is the result of that investigation.[1]

On June 3, 1999, defendants filed their Report to the Special Master Concerning the Disposition of Uncurrent Check Records Maintained by the Department of the Treasury ("Tyler Report") (Ex. 1) .[2] The Tyler Report revealed that, between November 23, 1998 and January 28,

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[1] I decline the invitation on behalf of declarants' counsel to submit a draft "for the purpose of receiving their suggestions" (Fed. R. Civ. P. 53(e)(5)) prior to filing this Report with the Court. Rather, I will file a Supplemental Report addressing any such comments.

[2] The Tyler Report is so named for convenience only. The Report was collaboratively authored by John R. Tyler, Senior Trial Counsel, Civil Division, Department of Justice; Catherine C. Pisaturo, Trial Attorney, Environment and Natural Resources Division, Department of Justice; and Patricia W. Milgram, Senior Counsel (Litigation), Bureau of Alcohol, Tobacco and Firearms,

1999, 162 boxes containing historical documents (i.e., government forms reflecting disbursements made by various federal agencies from the beginning of the twentieth century until approximately 1958) were destroyed at FMS' Hyattsville facility. These boxes were part of a cache of 407 boxes and ledgers stored in the basement of that facility.[3]

Upon being apprised of the destruction of the 162 boxes, FMS attorneys, with the assistance of several FMS employees, conducted a "page by page" search of the remaining 245 boxes of material in an attempt to ascertain the nature and content of the destroyed records. This search commenced on or about February 1, 1999 and concluded on or about February 11, 1999. This search yielded two boxes worth of files which referred to any one of the five named plaintiffs, Individual Indian Monies ("IIM"), or any Native American tribe, agency or individual.

The events leading to the destruction of the 162 boxes of documents are amply detailed in the Tyler Report and need not be repeated here. In glaring contrast to its commendable level of specificity on the document destruction, however, the Tyler Report was inexplicably ambiguous in its narrative of the events which took place between January 28, 1999 – the date when FMS attorneys first became aware that documents potentially relevant to the Cobell litigation may have been destroyed – and May

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Department of the Treasury.

[3] Attached to a letter dated May 19, 1999 by Attorney Brian Ferrell, General Litigation Section DOJ/ENRD, was a "GAO Document Index" which denominated the names of the first and last file in each of the 407 boxes. Ex. 35. While most of the names associated with the majority of the boxes are those of disbursing agents, Box #39 is labeled "Crow Indian Agency," Box # 47 is labeled "Fort Hall Indian Agency," and Box #80 is labeled "Rosebud Indian Agency."

11, 1999 – when the Court was finally notified of the destruction. The particular paragraph of the Tyler Report that ultimately launched this investigation reads as follows:

> In February, March, and again, in April 1999, the "GAO records,"[16] and the results of the review of the boxes of uncurrent check records that were not destroyed, were a topic of discussion by and among counsel who were handling the Cobell litigation. These boxes were discussed by counsel from time to time in the context of the myriad of matters that have arisen in this litigation in recent months. One discussion among counsel in late February 1999 concerned Treasury's effort to ascertain the universe of documents that might be relevant or potentially relevant to this lawsuit, for the intended purpose of identifying these documents to the Plaintiffs. The responsiveness and/or relevance of the uncurrent check records at the Hyattsville facility were discussed at that time. Subsequent discussions among counsel concerned the means by which the Special Master and the plaintiffs should be informed of the disposition of the records at issue. It appears that the attorneys who participated in these discussions had differing degrees of knowledge or understanding concerning the content and purpose of the records. They also have different recollections concerning what was said or understood about the nature of the records. The attorneys also had differing opinions concerning when to notify the Special Master that these records had been destroyed and differing recollections concerning internal discussions about this subject.

Ex. 1 (Tyler Report) at 15-16 (footnote 17 omitted).

As this description of events simply begged the question as to what actually transpired, I directed FMS former Deputy Chief Counsel Ingrid Falanga, FMS Senior Counsel Randy Lewis, FMS Senior Counsel Daniel Mazella, FMS Attorney-Advisor James Regan, Department of the Treasury Deputy Assistant General Counsel Eleni Constantine and Department of the Treasury Assistant General Counsel Roberta McInerney to submit declarations setting out their version of the events which

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[16] It appears that counsel did not understand at that time the nature and purpose of the Hyattsville basement documents. They believed that the records at issue were historical GAO records consisting of reports of requests to GAO by disbursing officers to recredit the proceeds of outstanding checks to another account.

transpired between January 28, 1999 and May 11, 1999. Upon receipt of these declarations, I then requested, from the declarants, the Department of the Treasury and the Department of Justice, all documents that related in any manner whatsoever to the document destruction referenced in the individual declarations. Over 15,000 pages were produced.

During the last week of July 1999 and the first week of August 1999, I interviewed the aforementioned counsel concerning the events which took place between January 28, 1999 and May 11, 1999; on September 3, 1999, I interviewed then-Acting General Counsel Neal Wolin.[4] The focus of these interviews was to determine why Treasury delayed more than 14 weeks before disclosing the destruction of documents that were potentially responsive/relevant to the Cobell litigation. Upon completing my interviews[5] and reviewing the pertinent documentation, I find that the issues underlying the delay by the Department of the Treasury in reporting the destruction of the Hyattsville documents can only be understood in the context of Treasury's role in the overall litigation. Accordingly, this

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[4] In addition to being represented by Treasury counsel, Roberta McInerney was represented by Donald Barnes, Esq., Jenkins & Gilchrist; Eleni Constantine was represented by Lawrence H. Wechsler, Esq. and John Kern, Esq., Janis, Schuelke & Wechsler; Ingrid Falanga was represented by Reid Weingarten, Esq. and Eric Kitchen, Esq., Steptoe & Johnson; Randall Lewis was represented by Pamela Marple, Esq., Manatt, Phelps & Phillips; Daniel Mazella was represented by William Dobrovir, Esq.; and James Regan was represented by Wendy White, Esq., Shea & Gardner. Neal Wolin chose not to be represented by personal counsel.

[5] Several of the individual declarants expressed concern at having counsel for Treasury present during their interviews. Accordingly, I conducted all the interviews with only with the declarant, myself, a law clerk and a court reporter in attendance. No objections were raised to proceeding in this manner. In addition, counsel for the declarants were permitted access only to the interview transcript of the individual they represented. Pursuant to a confidentiality agreement, a select number of attorneys at the Department of Justice and the Department of the Treasury were permitted access to all of the transcripts.

Report first sets out the key players in the Cobell litigation – insofar as they are relevant to the present analysis – and narrates the relationship between the various branches of the Department of the Treasury as well as that agency's role in this litigation. This Report then details the events following the discovery of the Hyattsville document destruction and sets out my findings and conclusions.

I The Persons and Agencies Involved In This Litigation.

Given the multitude of counsel representing the Defendants, in one capacity or another, whose names have surfaced in connection with this investigation, this section introduces only those attorneys who had a significant role in the Hyattsville document destruction and disclosure.

Within the Department of the Treasury, the two legal offices of particular relevance are the Office of the General Counsel, sometimes referred to as "Main Treasury," and the Office of the Chief Counsel, Financial Management Services ("FMS").

The Office of the General Counsel provides legal advice to the Department and its senior officials, including the Secretary of the Treasury. Ex. 17 at 5 (Wolin Dep.). Edward Knight was the General Counsel from September 1994 until his resignation in or around June of 1999. Id. at 4, 16. Neal S. Wolin has been the Acting General Counsel from June 12, 1999 to November 1999. Id. at 3-4. At the time of his interview, Mr. Wolin had been nominated by President Clinton to serve as the General Counsel and, on November 19, 1999, his nomination to that position was confirmed by the U.S. Senate.

The Deputy General Counsel, who reports directly to the General Counsel, supervises the Assistant General Counsels. Id. at 4-5. Neal S. Wolin was the Deputy General Counsel from April 17, 1995 to June of 1999. Id. at 4 (Wolin Dep.).

The Assistant General Counsel for Banking and Finance, who reports to the Deputy General Counsel, supervises the Deputy Assistant General Counsel for Banking and Finance and the non-supervisory attorneys in that office. Ex. 15 at 4-5 (McInerney Dep.). The Assistant General Counsel for Banking and Finance also supervises the Chief Counsel for FMS and the Chief Counsel for the Bureau of Public Debt ("BPD"). Id. at 4. Roberta McInerney has been the Assistant General Counsel for Banking and Finance from April of 1997 to the present. Id. at 5-6. Eleni Constantine, the Deputy Assistant General Counsel for Banking and Finance, reports to the Ms. McInerney and shares with her the supervision of the non-supervisory attorneys in that office. Ex. 11 at 4. (Constantine Dep.); Ex. 3, at ¶ 5 (Constantine Decl.). Ms. Constantine has served in that capacity from April of 1998 to the present. Ex. 11, at 5 (Constantine Dep.).

The Chief Counsel of FMS reports to the Assistant General Counsel for Banking and Finance and, in turn, supervises the Deputy Chief Counsel and the non-supervisory attorneys in that office. Ex. 15, at 4 (McInerney Dep.). From 1997 to October 1998, David Ingold served as Chief Counsel of FMS. Ex. 3, at ¶ 7 (Constantine Decl.). Ingrid Falanga served as the Acting Chief Counsel from October of 1998 to March of 1999. Ex. 5, at ¶ 1 (Falanga Decl.). In March 1999, Debra Diener was selected to occupy the position of FMS Chief Counsel where she currently serves. Ex. 3, at ¶ 7 (Constantine Decl.).

The Deputy Chief Counsel of FMS reports to the Chief Counsel and shares with that person the supervision of the non-supervisory attorneys in that office. Ingrid Falanga was the Deputy Chief Counsel from 1994 or 1995 to May of 1999. Ex. 12 at 4-5, 10 (Falanga Dep.).

The non-supervisory attorneys in FMS who report to the Deputy Chief Counsel and who were involved in the Cobell litigation include: Steve Laughton, Randall S. Lewis, Daniel J. Mazella and James J. Regan. Mr. Lewis was hired in March of 1992 and was promoted to Senior Counsel as of February 1998. Ex. 6 at ¶ 1 (Lewis Decl.). Mr. Mazella was hired in September of 1990 and was promoted to Senior Attorney as of February 1998. Ex. 7 at ¶¶ 1-2 (Mazella Decl.). Mr. Regan was hired in February of 1993. Ex. 16 at 4 (Regan Dep.).

II Document Preservation and Production Obligations.

A. June 1996 to October 1996.

On June 10, 1996, Plaintiffs filed the instant litigation seeking declaratory, injunctive, and mandamus relief against the Secretaries of the Interior and Treasury, and the Assistant Secretary of the Interior for Indian Affairs, for the "government's alleged mismanagement of Individual Indian Money (IIM) accounts." Cobell I, 30 F. Supp. 2d at 27, 29 & nn.3-4. The five named plaintiffs were certified, on Feb. 4, 1997, as "representatives of a class consisting of all present and former beneficiaries of the IIM accounts." Id. at 28.[6]

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[6] There are four published opinions arising from this litigation, of which three are relevant to this Report:

(1) On Nov. 5, 1998, this Court denied defendants' motions for summary judgment, to dismiss, or for judgment on the pleadings; denied defendants' motion to dismiss claim for retrospective relief; denied defendants' motion to adopt sampling approach; and denied plaintiffs' motion to strike extraneous materials. Cobell v. Babbitt, 30 F. Supp. 2d 24, 48 (D.D.C. 1998) ("Cobell I").

(2) On Feb. 22, 1999, this Court found Secretaries Rubin & Babbitt and Assistant Secretary Gover to be in contempt of this Court's orders governing defendants' document production. Cobell v. Babbitt, 37 F. Supp. 2d 6, 39-40 (D.D.C. 1999) ("Cobell II").

(3) On June 7, 1999, this Court denied defendants' motion for summary judgment on the common law claims and denied Treasury's motion for summary judgment on plaintiffs' prospective claims for relief. Cobell v. Babbitt, 52 F. Supp. 2d 11, 34 (D.D.C. 1999) ("Cobell III").

On June 12 and 15, 1996 - one week after this case was filed, Thaddeus Holt, Plaintiffs' attorney, corresponded with James Simon of the Department of Justice ("DOJ") and expressly requested that both the Department of the Interior and the Department of Treasury "take reasonable steps to preserve documents that may be relevant to the above action." Ex. 18 (Holt letters, June 12 & 15, 1996).

Although Mr. Simon was notified by Mr. Holt of the need to preserve documents in mid-June of 1996, Mr. Simon did not specifically notify Treasury about this until July 15, 1996 when Mr. Simon informed Ms. McInerney who, in turn, notified Mr. Laughton, about "Congress' interest on the issue of whether Treasury destroyed records relating to Individual Indian Money (IIM) account" and the need to preserve all records related to the IIM account to avoid any adverse congressional reactions. Justice believes the matter to be quite serious." Ex. 2, Attachment 00214-00215 (Laughton e-mail, July 15, 1996).

During the week prior to Mr. Simon's and Ms. McInerney's calls, Mr. Laughton had notified various management officials that Treasury was "involved in litigation in Federal District Court involving the Individual Indian Money account - 14X6039, and "that all documents, including e-mails, related to the IIM account should continue to be retained. . . . Any such documents subject to disposal . . . should be retained in hard copy form for potential use in litigation." Id. (Laughton e-mail, July 10, 1996).

In response to Mr. Laughton's correspondence, Russell Morris, a management official at FMS, inquired whether the perception that documents were being destroyed "was a mis-representation of the

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(4) On August 10, 1999, this Court ordered the payment of plaintiffs' attorneys' fees pursuant to its contempt order. Cobell v. Babbitt, 188 F.R.D. 122 (D.D.C. 1999).

mass cancellation of old check records and our on-going practice of scratching files of outdated checks." Id., Attachment 00216 (Morris e-mail, July 15, 1996). Mr. Laughton reassured Mr. Morris that his "impression [wa]s correct; however, Justice is taking a very expansive view of what FMS should retain." Id., Attachment 00217 (Laughton e-mail, July 15, 1996). Mr. Laughton then stated that, "[b]asically FMS does not maintain any records related to IIM accounts," meaning individual subaccounts as opposed to the overall numbers. Id.

In the summer of 1996, "FMS counsel also instructed agency personnel to retain all documents related to the IIM account, including e-mails and accounting records such as Statements of Transactions in STAR (Treasury's central accounting system), the check issue and cancellation data in the automated Check Payment and Reconciliation (CP&R) system, and IIM trust fund investment transaction data." Ex. 2, at 11 (Tyler Report).

On August 12, 1996, David Ingold, the then-Chief Counsel, FMS, advised Andrew Eschen (DOJ) of the records possessed by FMS that "would be covered under the terms" of Plaintiffs' proposed requests for interim relief. Ex. 2, Attachment 00219-00221 (Ingold letter, Aug. 12, 1996). Mr. Ingold stated that FMS would retain Treasury checks and accounting records (monthly summaries of transactions) beyond the record retention period; that investment records are retained "for as long as the account is in existence;" and that all e-mail messages are currently being printed out and archived (pursuant to a policy issued on Jan. 19, 1996) and that those relating to IIM are also being retained electronically. Id.

B. November 27, 1996 - "First Order for the Production of Information."

On November 27, 1996, this Court entered its "First Order for the Production of Information" ("November 27 Order")[7] directing the "Defendants [to] furnish to Plaintiffs as soon as practicable the following information and documents," of which there were 17 specified categories (Nos. 2 and 3 were reserved). Paragraph 19 of the November 27 Order ("Paragraph 19") called for the production of "[a]ll documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest." The November 27 Order further contemplated that document production be undertaken on a rolling basis, such that "information and documents be furnished or produced as each such item is prepared or becomes available, without waiting until all such information and documents are available."

The November 27 Order referred to "Defendants" in the plural throughout, and did not distinguish between Interior and Treasury. The Order, therefore, expressly covered both Departments.

C. Subsequent Discussions Regarding the Need to Preserve Treasury Documents.

On September 23, 1998, Mr. Mazella corresponded via e-mail with FMS Assistant Commissioners and managers, "to remind the senior managers and those with responsibility for records management and litigation coordination of the requirement that FMS preserve certain records." Ex. 7, at ¶ 9 (Mazella Decl.). This e-mail, which was copied to Ms. Falanga, was drafted in the context of obtaining reimbursement for the costs of preserving documents for this litigation: "[a]s you all know,

[7] As discussed in greater detail below, the November 27 Order was the product of mutual agreement between the Department of the Interior, the Department of Justice and the Plaintiffs. It appears that the Department of the Treasury was not involved in the drafting of this document nor were they consulted at the time as to its implications.

FMS has been under court order since August 1996 to preserve all documents, including e-mails concerning the Cobell litigation, which could relate in any way to IIM funds." Ex. 2, Attachment 00243 (Mazella e-mail). Mr. Mazella declared that, in October, 1998, he, Edward Gronseth (Deputy Chief Counsel, Bureau of Public Debt), and Brenda Hoffman (Attorney, BPD) coordinated "Treasury's policy to retain indefinitely Indian-related investment records." Ex. 7, at ¶ 10 (Mazella Decl.).

On Nov. 17, 1998, a meeting was convened which was attended by Mr. Mazella, Ms. Falanga, Ms. Locks, Ms. Hyman and other FMS managers,[8] during which "document retention issues relating to the lawsuit were discussed." "Ms. Locks recalled that "the discussion of document retention was addressed to specifically identified documents." Ex. 2, at 12-13 (Tyler Report); see also Ex. 7, at ¶ 13 (Mazella Decl.).[9]

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[8] Pamela Locks is the Director of the Financial Processing Division which has five branches. Doris Hyman is the Manager of the Banking Operations Branch.

[9] During his deposition, Mr. Mazella testified that the one section of the draft and final version of the Tyler Report "that I disagreed with" was the reference on page 13 where "Ms. Locks recalls that the discussion of document retention was addressed specifically to identify documents." Ex. 14, at 91 (Mazella Dep.). Mr. Mazella testified that he "believe[s] that that statement was incorrect" and this sentence should either be deleted or revised to indicate "that the discussion at the November 17th [1998] meeting . . . was not addressed to any particular documents but to preserving all documents." Id. at 92. Mr. Mazella testified that although he told this to Ms. Pisaturo (one of three co-authors of the Report), this sentence was left unchanged. Id.

According to the summary of this meeting, prepared by Ms. Jiovannah Diggs (Management Analyst - FMS Programs Branch), Mr. Mazella explained the status of Cobell and FMS' obligations to produce documents. Ex. 2, Attachment 00249 (Minutes of Nov. 17, 1998 meeting). Specifically, Mr. Mazella explained that "[s]ince FMS reconciles payments disbursed by Interior and reports payment status, FMS may be required to produce documents to the court (such as microfilm check copies, SF-1219/1220's and investment records) as it relates to the IIM accounts." Id. Ms. Diggs recorded that "Dan [Mazella] emphasized the importance of FMS being able to produce the documents and information that may be requested at the hearing. Therefore, he requested that all records pertaining to

On January 21, 1998, Mr. Regan (who was then assigned to this litigation) sent an e-mail to Ms. Falanga, Mr. Mazella, and other FMS management, setting forth his "synopsis of our current understanding of all Treasury records pertaining to the IIM account" and asking for their review. Ex. 2, Attachment 00237-00238A (Regan e-mail). Mr. Regan itemized these records as including (1) Investment Records; (2) Accounting Records - Summary Statements of Transactions; (3) Treasury Checks; and (4) Limited Payability Check Records. Id.

D. Defendants' Representations to this Court from December 1996 to December 1998 Regarding Document Production.

On December 20, 1996, Defendants filed their "Status Report" setting forth their progress complying with the November 27 Order. Ex. 19 (Status Report). Regarding Paragraph 19, the Defendants represented as follows:

> Financial records relating to the five named plaintiffs was provided to plaintiffs on December 10, 1996. Efforts are being made to locate and produce copies of all realty records relating to assets owned by each of the five named plaintiffs, and the defendants anticipate those records will be produced within sixty (60) days. Defendants have also requested that each of the five named plaintiffs identify the type and location of any and all property that they each own to expedite the location of all relevant records.

Id. at 7.

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this litigation be placed on hold and not be destroyed until further notice. Pam Locks stated that she has already placed a hold on microfilm check copies which are being produced from her area. In response to Dan's request to place a hold on all records at the records center pertaining to IIM accounts, I [Ms. Diggs] informed him that we in Records Management will do our best to prevent the destruction of FI's records." Id.

During the status calls in January and February of 1997, counsel for Defendants represented to this Court that Defendants were in compliance with this Court's November 1996 Order and that Defendants would work with Plaintiffs to resolve any remaining problems.[10]

Specifically:

- On January 21, 1997, Lewis Wiener (DOJ) represented to the Court that, although Plaintiffs had raised numerous concerns, "all of the commitments that the government made as to when it would produce documents, and the documents that would be produced, have been met. . . . We told them on December 27th [1996] what we would produce on what dates, and as far as I know, we are on track as producing the majority of the documents to date that we committed we would produce." Ex. 20, at 8 (Transcript of Status Call).

- On February 11, 1997, Mr. Wiener reiterated that Defendants "will continue to work with Plaintiffs to resolve whatever outstanding production matters remain unresolved." Ex. 21, at 5 (Transcript of Status Call).

- On September 15, 1997, counsel for Plaintiffs advised this Court that Defendants failed to produce any canceled checks. Ex. 22, at 5 (Transcript of Status Call).

- In their January 6, 1998 Status Report, which was submitted 14 months after the November 1996 Order, Defendants restated their objections to Plaintiffs' requests for document production relating to the Indian trust accounts. Plaintiffs then requested an informal conference to gather "all the people who are knowledgeable about the status, location, and need for the documents (including Treasury, Interior, Price Waterhouse and Arthur Andersen) and who are able to make binding commitments to produce the requested trust documents are present and can speak freely and informally . . . [which] will benefit all parties and the Court itself." Ex. 23, at 3 (Plaintiffs' Request for Informal Conference and Reply to Defendants' Status Report, Jan. 16, 1998) (emphasis in original).

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[10] Notwithstanding these overtures, Ms. Falanga testified that in early 1998, Andrew Eschen (DOJ) called Mr. Regan, the FMS attorney principally responsible for this litigation at the time, "and wanted us to get affidavits or declarations from our clients to resist discovery." Ms. Falanga refused since "we had an entire branch that did nothing but produce check copies, so I couldn't in good faith say that it was burdensome" to comply with Plaintiffs discovery requests. Ex. 12, at 23-24 (Falanga Dep.).

C During the June 16, 1998 status call, counsel for Plaintiffs reiterated their concerns that responsive documents had not been produced. Mr. Gingold stated: "we discovered that most of the documents that are related to the five named plaintiffs have not been produced . . . It's been 18 months." Ex. 24, at 3 (Transcript of June 16, 1998 Status Call).

Mr. Gingold further informed this Court that "We're also concerned about another aspect: documents that have not been turned up and are the subject of the November 27, 1996, production order . . ." Id. at 5. Mr. Gingold concluded by stating that: "[n]ot a single acknowledgment of receipt of funds for a single disbursement transaction has been produced. After 18 months and after we've been told that Treasury can produce checks in six months, not a single check has been produced. . . . notwithstanding the statements that have been made [by Defendants], there has been no true cooperation or effort in good faith to produce documents." Id. at 7. In response, Mr. Wiener claimed that "[t]hese allegations that Plaintiffs have raised in this eleventh-hour filing yesterday are half-truths, selected portions of transcripts, and do not convey the full story of what's going on here." Id. at 14. Mr. Gingold rebutted that, (1) "even with the representations made by Mr. Wiener, they are fraught with incompleteness," id. at 32, and (2) "[a]gain, not a single check has been produced by Treasury. Not a single certification for disbursement of funds has been produced by Treasury. . . . If this is an explanation of the completeness of records, then it's a very, very serious problem. And we're not even talking about the predecessor accounts here. . . . There has been no effort to produce the documents required under the order." Id. at 35.

C In late August of 1998, two months later, Defendants moved to amend or modify this Court's discovery orders, and asserted that "Defendants have made good faith efforts to produce documents for the five-named plaintiffs in this case." Ex. 25, at 7 (Defendants' Consolidated Motion, Aug. 28, 1998).

C On September 14, 1998, Plaintiffs filed their response to Defendants' Aug. 28, 1998 motion in which they pointed out that, "[t]he November 1996 order was a negotiated one. When the government agreed to it there was no suggestion that it could not be complied with. There was no suggestion that it was overly broad. There was no suggestion that some 'temporal' limit should be put on it." Ex. 26, at 3 (Plaintiffs' Response to Defendants' Motion, Sept. 14, 1998). Plaintiffs also cited to the Defendants' Dec. 27, 1996 Status Report [Ex. 19, supra], which had expressed no reservations about their compliance with Paragraph 19 of the Nov. 1996 Order. Id. at 4.

C During the Sept. 14, 1998 status hearing, Mr. Wiener represented to this Court, regarding the status of Defendants' document production, that: "The long and short of this is . . . we will produce documents for the five named plaintiffs as part of our on-going document production." Ex. 27, at 5 (Transcript of Sept. 14, 1998 status hearing).

C During the November 6, 1998 status hearing - almost two years to the day after this Court entered the November 27 Order - this Court inquired as to: "when the government can bring itself into compliance with the prior orders requiring the documents to be produced as to the named plaintiffs and again perhaps you can tell me more at the November 23rd [1998] hearing how you expect to go about bringing yourself into compliance." Ex. 28, at 5-6 (Transcript of Nov. 6, 1998 Hearing).

C During the November 23, 1998 status and motions hearing, there was an extensive colloquy between counsel for the parties and this Court concerning Defendants' discovery production.[11] Mr. Wiener asserted that: "There are no discovery obligations that I understand we are in violation of for having not produced." Ex. 29, at 19 (Transcript of Nov. 23, 1998 hearing). Mr. Wiener also advised this Court that, "I have been advised by our witnesses that the document productions for BIA [Bureau of Indian Affairs] and Treasury will take less time than [will] the document production for the Office of Special Trustee [Department of the Interior]." Id. at 67.

Mr. Gingold responded by reminding this Court that "[t]o date, item 18 and item 19 of that [Nov. 1996] order remain outstanding. . . . We've received no documentation whatsoever with regard to predecessor accounts. . . . We've received no documentation whatsoever with regard to disbursements from the system." Id. at 68. Mr. Gingold further noted that "one of the problems we have had from the very beginning is what appears to be casual representations of problems and then a subsequent recognition that the problem doesn't seem to exist. Over the past year Mr. Wiener and I have had many discussions with regard to documents that have not been produced." Id. at 72. Mr. Gingold summarized by asking, "What has been done? I mean, we're talking about a year, two years ago this Court issued the first order of production, and today we are not much further ahead than we were two years ago. How many more years are we going to go?" Id. at 77.

Mr. Wiener responded: "I have put the people at the Department of Treasury at work. They have told me that they will be able to produce documents for the specific five

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[11] Coincidentally, on this very day, FMS staff issued the actual order for the destruction of the Hyattsville documents. Ex. 2, at 9 (Tyler Report).

named plaintiffs, which I will personally turn over to plaintiffs' counsel." Id. at 81. Mr. Wiener also represented to this Court that "[t]hey [Treasury] say they have no documents on predecessor accounts. The Court's order says documents for the five named plaintiffs or their predecessor accounts. It doesn't say 'and,' it says 'or.' We are producing and trying to produce, and are representing to this Court today what we are doing to produce those documents for the five named plaintiffs. If they want documents for the predecessor accounts in lieu of the documents for the five named plaintiffs, then we can talk about how we're going to produce documents for them. But we are proceeding in good faith, your honor." Id. at 82-83.[12]

C On November 24, 1998, the status conference and motions hearing before this court resumed. At that time, Mr. Wiener represented to this Court that "[t]he only documents that have not yet been produced to Plaintiffs, by our records, are the OST [Office of Special Trustee, Interior] documents." Ex. 30, at 108-109 (Transcript of Nov. 24, 1998 hearing). John Miller (Deputy Special Trustee for Policy in the Office of the Special Trustee for American Indians ("OST"), Dept. of the Interior), who testified on behalf of the Defendants, asserted that the Treasury documents will not be among those that his agency will be searching for or be able to find in their records. Id. at 122-123. Mr. Miller emphatically stated, "[n]ever Treasury" and that "[i]t will be a total accident if they're there." Id. at 123. FMS Director of Financial Processing Division Pamela Locks, testified that "[i]t is my understanding that other documents, unidentified documents, will be produced, and it could be produced in a shorter period of time [than two months]." Id. at 168-169. Mr. Wiener then corrected his previous representation as to Treasury's document production: "Your Honor, I alerted the Court before the break that I had been provided with copies of the canceled checks from the Department of Treasury. I provided them here today to our opponents. I have not yet provided a copy to my own experts. My immediate interest was in providing them to Plaintiffs first." Id. at 197-198.

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[12] During this status conference, the Court questioned "[w]hy hasn't Treasury produced copies of checks in response to paragraph 19 of the Court's order?" Ex. 14, at 66 (Mazella Dep.), Mr. Mazella asserted that he had "provided Mr. Weiner . . . copies of checks that we had produced" the previous week, but Mr. Weiner did not tell this to the court. Id. Instead, Mr. Weiner responded that "[w]ell, Your Honor, I've put Treasury to work." This response apparently angered Mr. Mazella and caused him to complain to Mr. Weiner, who "apologized to me privately the next day for that." Id. at 66-67. Ms. Falanga corroborated Mr. Mazella's status-conference recollection: "[w]hen we finally did get the information [from DOJ and Interior] our people had to scramble in order to produce it timely. Dan [Mazella] turned the information over to Justice. Justice did not turn it over to the court and then [Mr. Wiener] represented to the court that Treasury essentially wasn't finished but they were making Treasury work." Ex. 12, at 72-73 (Falanga Dep.).

- At the December 15, 1998 status hearing, the Court stated to Defendants' counsel that "[y]ou haven't produced the documents relating to the five named plaintiffs yet." Mr. Wiener responded that "[w]e have produced documents for three of the five named plaintiffs as we have previously represented." Ex. 31, at 7 (Transcript of Dec. 15, 1998 hearing).

- During the January 25, 1999 contempt hearing, the Defendants represented to the Court that: "I think, absolutely no question at this point, vis-a-vis Treasury, that Treasury has done everything that it could do. Because one thing is clear here, is that Treasury can't pull any of these copies of checks until they're provided with adequate information. . . ." Ex. 32, at 1490 (Transcript of Contempt Hearing). In response, this Court remarked that, "You know, that's a very troublesome point to the Court too, because I had all these statuses for two years, and I had a representative of the Treasury sitting there at the table at every one of these statuses. They went two years and never produced one single check, one single piece of paper. And they waltz in here in November [1998] and their explanation is: 'Well, nobody at Interior every gave us a name or identifying data until November of '98.' So two years later after my order, suddenly, they wake up and tell me they've never produced a thing, when they're sitting here, when representations are being made by the Department of Justice that everything's been produced. How can they sit there silently, Treasury lawyers sitting there silently while that's being told to me, and never disclose to the Court what was going on?" Id. at 1490-1491. Mr. Brooks replied that "People weren't thinking. They were thinking that it was a Department of Interior order, that the Department of the Interior had to produce the documents." Id. at 1491.

III Other Incidents of Document Destruction at the Department of the Treasury.

The Hyattsville incident was not the first time that Treasury documents which may have been related to the Cobell litigation were either lost or destroyed. On two separate occasions, Treasury attorneys failed to promptly disclose these events to the DOJ, the Plaintiffs and this Court. For contextual reasons, these earlier incidents merit discussion.

A. The 1996 Bureau of Public Debt "Missing Box."

In November of 1996, "responsibility for investment of Federal trust funds was formally transferred from FMS to BPD [the Bureau of Public Debt]." Ex. 37 (Ferrell letter to Special Master, June 4, 1999). At that time, FMS sent 28 boxes by United Parcel Service ("UPS") to the BPD facility in Parkersburg, West Virginia. Only 27 boxes were received. Id. Inquiries were made within BPD and with UPS, but the box was never traced and UPS informed BPD that the package was lost. Id. According to Mr. Ferrell, the "missing box contained either correspondence or 1081s" dating back to March of 1995, with all older records already located at the Federal Records Center. Id. However, Mr. Ferrell asserted that, since BPD "possesses a folder containing all investment/redemption requests submitted by BIA [Bureau of Indian Affairs] and confirmations for all IIM account transactions . . . dating back to March 1, 1995," the BPD "believes they are able to account for all investment documents related to the IIM account." Id.

Ms. Falanga testified that, at an unspecified time, BPD attorney Brenda Hoffman "informed me that her bureau had investment-related documents that had been lost in shipment between FMS and Public Debt. I advised her that we need to tell Ms. Constantine immediately. We did, and the issue was added to our weekly to-do list." Ex. 12 at 190-192 (Falanga Dep.). Ms. Falanga further testified that when she raised the subject of formally disclosing the missing box, "Eleni [Constantine] essentially said no," and Ms. McInerney did not comment. Id. Ms. Falanga is certain that she attempted to impress upon Ms. Hoffman the need "to notify the Court about the destruction." Id.

On May 11, 1999, after disclosing the destruction of the Hyattsville documents, the DOJ notified the Court about the BPD "missing box" problem. Ex. 1, at 2 (Brooks letter to the Special Master). The following month, a more detailed analysis of this problem was provided in which Mr.

Ferrell concluded that, although the BPD cannot verify the contents of this box, the BPD "believes that they are able to account for all investment documents relating to the IIM account," and the missing records only go back to March of 1995. See Ex. 37, passim.

B. The June 1997 Destruction of Microfilms.[13]

In July of 1997, Mr. Laughton, the FMS attorney who was principally responsible for the Cobell litigation at that time, emphasized to FMS management the need to preserve documents pertaining to Individual Indian Money records. Ex. 2, Attachment 00235 (Laughton e-mail, July 21, 1997). On that score, Mr. Laughton asserted: "I hope that is what we are doing." Id. Later that week, Mr. Laughton spoke with Jim Sturgill (FMS), who confirmed that "the representation I made to DOJ in the August 12, 1996 letter regarding FMS' retention of microfilm copies of Treasury checks beyond 6 years 7 months was being implemented." Ex. 2, Attachment 00236 (Laughton memorandum, July 23, 1997). Mr. Laughton informed Andrew Eschen (DOJ) at this time that FMS was retaining these microfilms. Id.

During the January 11, 1999 contempt hearing, Mr. Sturgill testified that the Department of the Treasury destroys microfilms on a monthly basis: "As it aged, typically, on the beginning of every month, they would destroy the oldest month of microfilm." Ex. 32, at 57 (Transcript of contempt hearing). The Court then asked Mr. Sturgill, "And what you discovered when you went down there was that no one had ever communicated to the people who were actually destroying the microfilm your prior agreement not to destroy it?" to which he replied, "That's correct." Id. Mr. Sturgill testified that

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[13] The deponents used the terms microfilm and microfiche interchangeably.

the instructions prohibiting the destruction of documents "were given orally to one of the supervisors to contact Johnson Controls," the contractor in charge of destroying old documents. Id. at 58. Mr. Sturgill asserted that, regarding his knowledge of this Court's November 1996 Order, "No, I wasn't aware of that order." He similarly claimed not to have "any knowledge" of Treasury's compliance with this Order. Id. at 60.

Mr. Mazella and Ms. Falanga each testified that they did not learn until early 1998 of the June 1997 destruction of the microfilm checks. Once aware of the destruction, Mr. Mazella and Ms. Falanga informed Mr. Eschen (DOJ) by telephone "that we didn't have all of the microfilm," and they subsequently sent him an inventory in April of 1998. Ex. 14, at 46-49 (Mazella Dep.).

Ms. Falanga recalled that "sometime in - between January and March of '98" she "discovered that [the microfilm check records] had just been destroyed." Ex. 12, at 24-25 (Falanga Dep.). She testified that James Brake (FMS) had told her "they had just destroyed a bunch of microfilm. And since I knew this was contrary to our agreement, I immediately called Justice to let them know and talked to Andy Eschen, and I left voice mails for Pam Locks [FMS] and told her we needed to talk immediately." Id.

Ms. Falanga further recounted that "[s]he then met with the client and the assistant commissioner for that area [Mitch Levine] to essentially read them the riot act," since the destruction of the microfilms was contrary to the Mr. Laughton's representation that such documents would not be destroyed. Id. at 29. Ms. Falanga concluded her testimony on this event by stating that she advised Mr. Ingold to inform Ms. McInerney, "because the records indicated that Roberta McInerney had been involved in the original agreement to preserve the microfilm." Id. at 31-32. However, Ms.

Falanga had no independent knowledge as to whether Mr. Ingold actually reported this destruction to Ms. McInerney. Id.

In early February 1998, the FMS attorneys and staff took affirmative steps to ensure that no further destruction of any microfilms would occur. Mr. Regan sent an e-mail to Ms. Falanga and Mr. Mazella informing them that he had spoken with the FMS management in charge of these records, and "reiterated that FMS should not destroy ANY microfilm copies of negotiated Treasury checks UNTIL FURTHER NOTICE given the matters at issue in Cobell." Ex. 2, at 11 and Attachment 00239 (Regan e-mail, Feb. 5, 1998) (emphasis in original).

James Sturgill (FMS) then sent an e-mail to Ms. Locks, Ms. Falanga, Mr. Mazella, and others, stating that FMS will complete its inventory of the microfilm checks in storage and the dates covered. Id., Attachment 00240 (Sturgill e-mail, Feb. 9, 1998). Mr. Sturgill then emphasized that: "Make sure WE DON'T DESTROY anything! I'd suggest Pam [Locks] put out a memo to this effect." Id. (emphasis in original.)

Ms. Locks then informed FMS attorneys that the microfilm inventory had already been completed. Id., Attachment 00241 (Locks e-mail, Feb. 9, 1998). Ms. Locks wrote that "I personally spoke with Herb [Taylor] last Friday to inform him not to destroy ANYTHING until further notice." Id. James Brake (FMS) then informed the outside contractor, who had destroyed the microfilms, that this was to stop: "This memorandum is a follow-up for you not to destroy any more microfilm until further notice." Id., Attachment 00242 (Brake memorandum, Feb. 10, 1998).

Mr. Mazella recalled that, in March and April of 1998, he and Andrew Eschen (DOJ) drafted the declaration of Ms. Locks regarding these microfilm records. Ex. 14, at 52-53 (Mazella Dep.). Mr.

Mazella testified that Mr. Ingold "asked me or directed me to make sure that the disclosure of how much microfilm was left was contained in the declaration of Ms. Locks." Id. However, Mr. Mazella testified that the final version reflected the input of Messrs. Ingold and Eschen, since it mentioned what was left, and did not mention that microfilms had been destroyed. Id. Noting his discomfort with this disclosure, "[b]ecause I was unsure that that was really a complete disclosure," Mr. Mazella admitted that Ms. Locks' declaration omitted the fact that certain microfilms had been destroyed. Id. at 54.

Mr. Mazella testified that, in retrospect, he believed that Ms. Locks' declaration did not suffice to satisfy what he considered to be his duty to notify the Court about the microfilm destruction. Id. at 56-57. Mr. Mazella believed "that the Department of Justice should have made a more complete disclosure of the destruction of the microfilm," id. at 57, as Ms. Locks' declaration "was drafted in a way so that it would not give a complete picture of what happened." Id. at 61.

Mr. Mazella remembers informing Ms. Falanga of the failure to disclose the destruction of the microfilms in Ms. Locks' declaration, and "that she was uncomfortable with that, also, but that was Mr. Ingold's decision." Id. at 56.

Mr. Mazella testified that, in late November 1998, he and Ms. Falanga informed Ms. Constantine and Ms. McInerney, for the first time, "that this destruction [of microfilms] had occurred" in 1997, and "so all of us . . . felt that disclosure should be made complete, and that was done so . . . in the Defendants' response to the show cause motion." Ex. 14, at 54-55 (Mazella Dep.).

Ms. Falanga also testified that, in late November 1998, Ms. Constantine and Ms. McInerney were informed of the microfiche destruction. Ex. 12, at 93-94 (Falanga Dep.). Ms. Falanga informed them "that I had talked to Susan Cook [DOJ/ Environment & Natural Resources Division ("ENRD")]

who had been added to the case, and after I had reported the destruction of the microfilm, . . . Justice did not report to the court. What Justice did, with the agreement of the chief counsel [Mr. Ingold] and I wasn't involved, I was out at that period, they finessed the issue. They made an affirmative statement about the amount of microfilm we had, rather than say, we destroyed." Id. at 93-94. Ms. Falanga testified that she believed that this statement was in Ms. Locks' affidavit. Id. Ms. Falanga admitted that while she had raised her concerns with the Locks affidavit and the microfilm destruction with DOJ, these issues were not reported to this Court until the January 1999 contempt hearing, "and it was finessed in a motion to dismiss." Id. at 98.

Ms. Constantine testified that when Mr. Mazella and Ms. Falanga informed them, in late November of 1998, about the July 1997 destruction of the microfilms, that she "was quite concerned. I think Roberta [McInerney] was too. We felt that we immediately had to tell the General Counsel about this problem. This was a level of problem that had to go up right away." Ex. 11, at 57 (Constantine Dep.); see also Ex. 3, at ¶ 9 (Constantine Decl.).

Ms. McInerney testified that she "can't remember when I learned about that," Ex. 15, at 49 (McInerney Dep.), and that as of late 1998, she "wasn't so much involved even in the details like the microfiche. I was hardly even aware of the microfiche destruction. I was just wasn't that involved in the case." Id. at 75. Ms. McInerney also testified that "I don't remember being aware, to be honest, of the microfiche destruction until much later when we were talking about . . . . the summary judgment motion." Id. at 100.

The Treasury attorneys, during a December 1998 meeting with the DOJ/ ENRD attorneys, headed by Assistant Attorney General Lois Schiffer, "also advised DOJ of the inadvertent destruction

of the microfiche checks and recommended immediate disclosure of this destruction to the Court, with which DOJ agreed." Ex. 3, at ¶ 12 (Constantine Decl.). Mr. Wolin testified that he attended this meeting, which occurred on or around December 28 or 29 of 1998, during which, he believed that the microfiche destruction was mentioned. Ex. 17, at 54-55 (Wolin Dep.).

Mr. Wolin testified that when he learned of the destruction of the microfiches, he "absolutely" expected Ms. Falanga and Mr. Mazella would have reported this destruction to him immediately, and this would have resulted in "a direct report to counsel at Justice and in turn to the court, absolutely." Ex. 17, at 56 (Wolin Dep.). Mr. Wolin testified that it was this event that made him realize there was a need for better oversight from Main Treasury, and he therefore assigned Ms. Constantine to this litigation for that purpose. Id. at 58-59.

In its Opinion holding then Secretary Rubin in contempt, this Court held that the destruction of these microfiches, contrary to the preservation order, "is attributable to poor instruction from management level officials" and, therefore, "is indicative of the [Treasury Department's] overall performance in this litigation." Cobell II, 37 F. Supp. 2d at 28.

IV The Hyattsville Documents.

A. The January 28, 1999 Discovery of the Destruction.

1. Ms. Locks Discovers a Folder with Indian-Related Documents on Her Chair and Reports This to Mr. Mazella Who Orders Her to Stop the Destruction of These Documents.

According to the Tyler Report, on January 28, 1999, Ms. Locks "found a folder on her office chair which contained a reference to IIM accounts. After making some inquiries, Ms. Locks learned that the files had been pulled from the boxes in the basement, which were in the process of being

destroyed. Concerned about the reference in the records to IIM, Ms. Locks interrupted a meeting attended by FMS Senior Attorneys Dan Mazella and Randy Lewis. Ms. Locks showed Mr. Mazella the file folders, and indicated that the files were currently being destroyed. Ms. Locks inquired whether the documents might be relevant to the Cobell litigation. Seeing the reference to IIM, Mr. Mazella immediately instructed Ms. Locks to stop the disposition of the documents. No additional disposal took place following the order to stop." Ex. 2, at 10 and Attachments 00051-00053 (Tyler Report and Jan. 28, 1998 e-mails).

Mr. Mazella declared that Mr. Lewis and he "were conducting witness preparation . . . when Ms. Locks informed us of the existence of the boxes in the basement at Hyattsville and that the documents were being destroyed. One of the files that Ms. Locks showed me had a listing of IIM checks which appeared to have been outstanding and canceled and included the names of payees. Two other files . . . were clearly from disbursing officers from Bureau of Indian Affairs agency or area offices. I told Ms. Locks to go downstairs and stop destroying documents, which was done." Ex. 7, at ¶ 15 (Mazella Decl.). Mr. Mazella expounded upon this during his deposition when he testified that when he saw the "document which had the individual Indian money and it had listings of payments and it had people's names on it, and that they were being destroyed, I was shocked." He recalled that "Ms. Locks told [him] that she had these documents which were clearly potentially relevant to the litigation that were being destroyed. And I told her to stop destruction immediately. To go downstairs and stop." Ex. 14, at 126-128 (Mazella Dep.).

2. Mr. Mazella Reports the Document Destruction to Ms. Falanga.

According to the Tyler Report, "[i]mmediately following the discovery of the material from the basement referencing IIM accounts on or about January 28, 1999, Attorney Mazella contacted Ingrid Falanga who was at a FMS meeting in Charlottesville, and she informed the FMS commissioners . . . and apprised her of the situation." Ex. 2, at 14 (Tyler Report). Until that time, Mr. Mazella claimed that "he was unaware of the existence of the Hyattsville boxes and/or their contents (as well as the ledgers and other materials since discovered in the Hyattsville basement) until Ms. Locks brought the files to my attention." Id.

Ms. Falanga confirmed that she "first learned of the Hyattsville records" when Mr. Mazella told her about their destruction. Ex. 5, at ¶ 4 (Falanga Decl.). Ms. Falanga recalled that "Mr. Mazella informed me that he had immediately ordered everyone to stop the destruction of any and all documents. Mr. Mazella also informed me that he had learned from Doris Hyman, an FMS employee, that these boxes probably had Indian-related documents in them. I also believe that Mr. Lewis informed me at this time that these appeared to be GAO documents." Id. Ms. Falanga testified that, at the time, she "considered them GAO documents" and not Treasury documents, which would have "a different implication to me" for the Cobell litigation;[14] she recognized that subsequently "there was a decision that they were, in fact, Treasury documents." Ex. 12, at 42-44 (Falanga Dep.). Ms. Falanga further testified that Mr. Lewis "informed me at the time that these appeared to be GAO documents," but she was still concerned because Mr. Mazella said that Ms. Hyman had told him that "these boxes probably had Indian-related documents in them," which alerted her that "we had another crisis in Cobell." Id. at 58.

[14] Curiously, as of May 7, 1999, Ms. Falanga still "considered them GAO documents." Id. at 43.

Specifically, Ms. Falanga testified that even though she thought they were GAO documents, she was still concerned "first of all, because they were in our facility. Secondly, because they were from disbursing officers, which meant that they involved payments. They were related to Indians, which meant that they were related to Cobell or potentially related to Cobell and they had been destroyed." Id. at 59.

Ms. Falanga testified "that our client had screwed up again and we would have to tell the court" and that this was "related to Cobell." Id. at 111-112. Ms. Falanga informed the FMS commissioners at the Charlottesville meeting about the destruction, and that these boxes may have related to Cobell and the Indian documents. Id. Ms. Falanga does not recall Mr. Mazella telling her why he thought they were Indian documents, "only that they were." Id.

3. Ms. Falanga and Mr. Mazella Inform Ms. Constantine and Ms. McInerney About the Document Destruction.

According to the Tyler Report, "[a] conference call was then conducted with Mr. Mazella, Ms. Falanga, Eleni Constantine [] and Roberta McInerney []. The attorneys discussed the discovery of the boxes in the basement, the need to determine the nature of the records and the quantity of records disposed of, and the need to issue a mandate to preserve all records." Ex. 2, at 14 (Tyler Report).

Mr. Mazella declared that Ms. Falanga (who was in Charlottesville) and he "called Ms. McInerney and Ms. Constantine late that afternoon to inform them of the destruction of the boxes and the nature of the materials we had seen. I told Ms. McInerney and Ms. Constantine that I had been shown a file of what appeared to be listings of outstanding checks, labeled as IIM payments, which contained people's names. [They] instructed us . . . to have FMS attorneys search through the remaining boxes to see if any documents were responsive to the court's November Order." Ex. 7, at ¶ 16

(Mazella Decl.). Mr. Mazella testified that at the time he understood that these documents could be responsive to the November 27 Order, "and the fact that it had people's names meant that, you know, it was potentially responsive to the court's November Order" since it had names which might have "information about a named plaintiff" or their "predecessors in interest." Ex. 14, at 130 (Mazella Dep.). Mr. Mazella testified that, during this conference call, either Ms. Constantine or Ms. McInerney "said, do you mean to tell me that we have destroyed potentially responsive documents? And my answer was, yes." Id. at 133.

Ms. Falanga declared that Mr. Mazella and she "left an urgent message" for Ms. Constantine and Ms. McInerney and "when we reached Ms. McInerney and Ms. Constantine later that same day, we told them everything we knew about the situation . . . . we agreed that we would try to establish . . . whether there were any responsive documents in the remaining boxes." Ex. 5, at ¶¶ 5-6 (Falanga Decl.). Ms. Falanga testified that she informed Ms. McInerney and Ms. Constantine that these documents "were Indian-related documents," although Ms. Falanga did not actually say to them that these documents were related specifically to Cobell. Ex. 12, at 115 (Falanga Dep.). Ms. Falanga stated that Ms. McInerney, Ms. Constantine and she agreed that they would determine whether there were any documents responsive to "any discovery order" in the Cobell litigation. Id. at 117. Ms. Falanga admitted that she did not discuss with Ms. McInerney and Ms. Constantine whether the destroyed documents should be disclosed to the court, and she had no discussions with FMS counsel regarding disclosure to the court, since "[o]ur focus at that time was trying to figure out what was there, what had been destroyed, and who did what, so that when we did articulate it, we could reasonably articulate what had happened." Id. at 136-137.

Ms. Constantine testified that she believed that Ms. Falanga was the first person to inform her about the documents, and that her reaction was: "[w]hat are these documents. . ." Ex. 11, at 81 (Constantine Dep.). When Ms. Falanga said she didn't know, Ms. Constantine then responded, "Well, wait a sec. We're in the middle of a very contentious litigation. We're in the process of trying to find all of the relevant documents that are out there, and we discover that people are just throwing away unknown documents. This is bad. We shouldn't have this situation." Id. at 81-82. Ms. Constantine declared that neither she nor Ms. McInerney "were aware of the nature of the documents that had been destroyed nor of the period over which the destruction had occurred." Ex. 3, at ¶ 18 (Constantine Decl.). Ms. Constantine insisted that: "if I or any Treasury counsel had known that the documents were potentially responsive, we would have immediately reported their partial destruction to the [DOJ and the Court], as we had done with the microfiche." Id.

Ms. Constantine testified that Ms. Falanga "told me they were GAO documents . . . she said something like probably more summary level accounting documents and that nobody knew what they were." Ex. 11, at 88 (Constantine Dep.). Ms. Constantine maintained that if she had known that these documents included specific references to either Indians or IIM accounts, she would have reacted differently: "[a]bsolutely. I believe I would have thought that those are responsive documents. . . . I believe I would have viewed those as responsive documents that we had to, you know, immediately, right away, inform the Court . . . that there was the potential that they had been destroyed," although she then elaborated that "We would have asked DOJ to inform the Court," instead of Treasury informing the Court directly. Id. at 88-89.

Ms. McInerney declared that "I recall having a telephone conference call with Ingrid Falanga, Eleni Constantine, and Dan Mazella during which Ms. Falanga and Mr. Mazella informed Ms. Constantine and me that a number of boxes of documents had been discarded at the FMS Hyattsville facility." Ex. 9, at ¶ 3 (McInerney Decl.). She recalled that "[t]he documents were generally described (by either Ingrid Falanga or Dan Mazella, I can't recall which one) as being old GAO records stored in the basement of FMS's Hyattsville facility about which the FMS lawyers had no prior knowledge. The documents were also described generally as non-Treasury documents that were not on any Treasury document retention schedule. Ms. Constantine and I asked Ms. Falanga . . . [to search] to determine what the documents were, whether they were responsive to any outstanding document production order in the Cobell litigation . . ." Id.

Ms. McInerney was confident that she was not informed about the specific nature of the documents, beyond Mr. Mazella having described them "as old GAO records, not even Treasury records, undifferentiated government-wide accounting records." Ex. 15, at 80 (McInerney Dep.). Accordingly, "[h]er clear impression after the conversation was that they were summary level accounting documents. That's what they seemed to be." Id.

4. Messrs. Wolin and Knight are Informed About the Document Destruction.

Ms. Constantine and Ms. McInerney both recalled briefing Messrs. Knight and Wolin about the document destruction shortly after they learned about it. Ms. McInerney stated that "I recall that both Messrs. Knight and Wolin were very concerned about this issue . . ." Ex. 9, at ¶ 3 (McInerney Decl.). Ms. Constantine similarly declared that "after talking with Ms. Falanga together we immediately notified

Mr. Wolin and Mr. Knight about the destruction." Ex. 3, at ¶ 18 (Constantine Decl.). Ms. McInerney testified that she told Messrs. Knight and Wolin "that it looked like we were probably okay here but we're nonetheless doing a search of the documents to make sure," based upon the representations made by FMS counsel. Ex. 15, at 118-119 (McInerney Dep.).

Mr. Wolin testified that he was not told that the Hyattsville boxes contained Indian- related documents until either when he read the Tyler Report, or in early May when Ms. Constantine "came to finally tell me that there were materials in these boxes that were potentially responsive to the court's orders." Ex. 17, at 62-64, 70 (Wolin Dep.). Mr. Wolin emphasized that had he been so informed in late January, "I would have wanted to get the Justice Department on the line right away." Id. at 67.

Regarding what should have been the correct procedure, Mr. Wolin was clear: "as soon as any Treasury lawyer was aware of information that there — was of the belief or had any reason to believe that there was material in those boxes that was potentially responsive to the court's orders, discovery orders in this case, my view is they had an obligation to report it up their line, their chain, and probably in any case to report it to the Justice Department lawyers with whom they were having not a small amount of interaction on other matters." Id.

V Events Following the Document Destruction.

A. The February 1, 1999 Order for Document Preservation.

Ms. Constantine testified that, during the January 28, 1999 meeting, FMS counsel informed Ms. McInerney and herself, "for the first time that there had not been any formal order regarding the preservation of documents relevant to the litigation . . . and we determined that such an order should be

issued immediately." Ex. 3, at ¶ 18 (Constantine Declaration).[15] Accordingly, Mr. Mazella drafted a memorandum for FMS Commissioner Richard L. Gregg's signature, alerting the FMS Assistant Commissioners regarding document production and preservation protocols. Ex. 12, at 118 (Falanga Deposition). Ms. Falanga testified that she reviewed and edited this memorandum, id., as did Ms. Constantine. Ex. 3, at ¶ 19 (Constantine Declaration).

B. Review of the Remaining Hyattsville Documents.

During or after the January 28, 1999 telephone conference between FMS and Main Treasury, Ms. Falanga "assigned James Regan . . . to review the remaining boxes of documents in Hyattsville." Ex. 5, at ¶ 8 (Falanga Declaration). Ms. Falanga testified that she ordered Mr. Regan to oversee the document search "because he had prior involvement with the case," because he was familiar with the scope of Paragraph 19, and "knew that we were looking for documents related to Cobell or to IIM accounts." Ex. 12, at 130-131 (Falanga Deposition).

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[15] During the FMS-Hyattsville site visit, Ms. Locks told the Special Master that she did not know of any prohibition on Indian document destruction prior to February 1, 1999, and that she would have known if such a policy prior to that time had been issued. Tom Fisher also stated that he first learned of the no-destruction and preservation policy for the Indian IIM documents on or around February 10, 1999.

Both Mr. Mazella and Ms. Falanga took issue with these assertions. Mr. Mazella testified that he informed Ms. Locks at the November 17, 1998 meeting with the FMS managers "of the need to preserve all documents that are potentially relevant to the Cobell litigation." Ex. 14, at 123-125 (Mazella Deposition). Similarly, Ms. Falanga testified that Ms. Locks should have known of her duty to preserve documents, and rejected Ms. Locks' claim that she was aware of this duty, stating: "I don't believe it's possible." Ex. 12, at 106-107 (Falanga Deposition). Ms. Falanga also remarked that "She [Ms. Locks] also said that with the destruction of the 1997 microfilm. And at that time she was shown all of the e-mail traffic and directions to her to preserve everything." Id.

On January 29, 1999, Messrs. Mazella, Lewis and Regan met with several FMS staff members at the Hyattsville facility to conduct a preliminary review of the remaining boxes. Ex. 6, at ¶ 5 (Lewis Declaration); Ex. 10, at ¶ 4 (Regan Declaration). Mr. Lewis declared that he personally "helped review one or two of the remaining boxes" at Hyattsville and that he understood that they were to search for the five named plaintiffs, but that he "did not find any documents relating to the five named plaintiffs. Ex. 6, at ¶ 5 (Lewis Declaration). Mr. Lewis further declared as to his understanding "that a second purpose was to search the remaining boxes for any files which logically could be linked to the Department of the Interior, in general, or the Individual Indian Monies trust fund, in particular, because we would have to review the remaining files again once we received the names of predecessors in interest from the Department of the Interior;" for that reason, Mr. Lewis pulled any file that pertained to Interior or Indians. Id.

Mr. Regan testified that Mr. Mazella's briefing of the participants at the beginning of this search was his "first . . . hearing or exposure to paragraph 19" of this Court's November 1996 discovery order. Ex. 16, at 86 (Regan Deposition). After a preliminary review of the boxes during this search, the FMS counsel "concluded that a page by page search of all of the remaining Hyattsville records was necessary because . . . a smaller number of documents referenced individual payees." Ex. 10, at ¶ 4 (Regan Declaration).

On February 1, 1999, the two-week review of the boxes and ledgers remaining at FMS Hyattsville commenced. Ms. Locks notified her staff, including Tom Fisher and Check Reconciliation Branch Accountant Brent Weaver, that Mr. Regan would meet with them this morning, "before we start the 'basement excursion.'" Ex. 2, Attachment 00054 (Tyler Report). At this meeting, Mr. Regan

briefed the search team of the need for the page-by-page search "because Treasury was under Court order to produce all documents and records relating or referring to the IIM accounts of the five named plaintiffs or their predecessors in interest." Ex. 10, at ¶ 6 (Regan Declaration). The search team was directed to search for any documents referencing IIM or any Indian tribe, agency, or individual name. Id.[16] Mr. Regan testified that he himself set "the search parameters [which] were designed to look for the five named plaintiffs." Ex. 16, at 171 (Regan Deposition). Mr. Regan testified that he "wrote down the names of the five main plaintiffs, which people copied." Id. at 87-89. Mr. Regan supervised this search for the rest of this week; Carolyn Talley (another FMS attorney) did so the following week, while Mr. Regan was away. Ex. 10, at ¶ 7 (Regan Declaration).

Mr. Regan noted that "during the search I concluded in my own mind that they were potentially responsive," but he did not share this conclusion with the other FMS attorneys until February 25, 1999. Ex. 16, at 166-167 (Regan Deposition).

Ms. Falanga testified that, as of early February 1999, she was aware "that there were Indian-related documents that had payee names on them," and that these were potentially responsive documents. Ex. 12, at 119 (Falanga Deposition). Ms. Falanga further testified that although she was

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[16] During the Special Master's May 17, 1999 site visit to FMS-Hyattsville, several of the FMS staff discussed their participation in the search and the instructions they received. Mr. Weaver (the only member of the search team who actually had utilized the documents located in the boxes as part of his work), stated that he was instructed to look specifically for the five- named plaintiffs and any other name that was "Indian sounding." Prior to the search, he admitting having no knowledge of the Cobell litigation. Tom Fisher stated that the searchers were told the names to search for, but were never shown or given any written list of names. Rita Howard stated that the searchers reviewed each of the remaining boxes, and that two boxes worth of files and several ledgers were set aside. Pamela Locks stated that she did not know of any criteria for reviewing and pulling documents other than the names of the five plaintiffs, and anything that sounded like an Indian name.

not personally involved with the search, she did examine one file and had "no doubt in my mind" that it was potentially responsive, because it was Indian related. Id. at 124-125. Ms. Falanga agreed that Mr. Regan also did not have "any doubt about" these documents were somehow related to Cobell. Id. at 138-139.

The search and review of the boxes and ledgers were completed by February 11, 1999. According to the Tyler Report, "[t]wo boxes worth of materials consisting of 114 files were culled during the page-by-page search of the 245 boxed records in accordance with the established search criteria . . . . No documents identifiable to the five named plaintiffs or their IIM accounts were found during this search of the 245 boxes." Ex. 2, at 15 (Tyler Report).

Mr. Regan testified that 114 files were "pulled in accordance with the criteria outlined in the search [meeting]," and asserted that the search criteria were in conformity with the November 27 Order: "[i]n my opinion, they were potentially responsive, and the results of the search were given to Ms. Falanga and Mr. Mazella." Ex. 16, at 101-103 (Regan Deposition). Mr. Regan admitted, however, that although they were subsequently able to rule out certain files as not being Indian-related, at that time (i.e., as of February 11, 1999), every file was potentially responsive to Paragraph 19, "because, let's see, most of them would have referenced individual[s]." Id. at 105.

C. Preparation for the February 11, 1999 Briefing of Mr. Knight.

On or around January 29, 1999, Ms. Constantine instructed Mr. Mazella "to draft a summary of the Cobell litigation discovery status" for Mr. Knight, the General Counsel. Ex. 7, at ¶ 20 (Mazella Declaration). According to Mr. Mazella, "Ms. Constantine asked me by telephone to include . . . the number of times that FMS Office of Chief Counsel staff had sought confirmation that documents were

being preserved. Ms. Constantine told me that Mr. Knight wanted to have that information in order to be assured that the FMS' failure to preserve the Hyattsville boxes was not the lawyers' fault." Id. On February 8, 1999, Mr. Mazella and Ms. Falanga met with Ms. McInerney and Ms. Constantine to provide them with the requested information, i.e., the occasions on which the FMS attorneys sought confirmation that documents were being preserved. Id. Mr. Mazella and Ms. Falanga revised their summary in accordance with Ms. Constantine's and Ms. McInerney's comments. Id.

On February 11, 1999,[17] Ms. Constantine, Ms. McInerney, Ms. Falanga, Messrs. Mazella and Knight (and possibly Mr. Wolin) met to discuss the aforementioned document that was to be used to brief the Secretary of the Treasury regarding Treasury's discovery responses. Ex. 4, at ¶ 1 (Constantine Supplemental Declaration). According to Ms. Constantine, "Mr. Knight asked what the result of the review of the GAO documents had been. FMS counsel [Ms. Falanga and/or Mr. Mazella] responded that the review was still ongoing and that so far nothing significant had turned up." Id. Ms. Constantine testified that the purpose of this meeting was "to go over the charts of the document" which Mr. Knight was to use to brief the Secretary on the document production. Ex. 11, at 118 (Constantine Deposition). According to Ms. Constantine, "[w]e went over the chart, and Mr. Knight raised the question of, 'Well, weren't there those — some documents that we heard about, the GAO documents, nobody knew what they were? What happened about them?' And the FMS counsel [Ms. Falanga] responded that they were looking at the documents, and they were thoroughly reviewing them, and we would, you know, we would get back [to him]." Id. Ms. Constantine testified that Ms. Falanga's representation to Mr. Knight

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[17] Mr. Mazella recalled that this meeting took place on February 12, 1999. Ex. 7, at ¶ 20 (Mazella Declaration).

was "erroneous," since the search was completed and responsive documents had been uncovered. Id. at 119-120.

Ms. Falanga testified that she told Ms. McInerney and Ms. Constantine that nothing responsive to Paragraph 19 had yet been found, "because we weren't finding any names in [of] the five named payees." Ex. 12, at 140-141 (Falanga Deposition). However, Ms. Falanga, who acknowledged that Paragraph 19 included the predecessors in interest and that the Hyattsville documents were "potentially responsive," admitted that she did not relay that conclusion to the other Treasury attorneys. Id.

Mr. Mazella declared that, at this meeting with Mr. Knight, "all of us discussed the revised discovery summary, which included a brief discussion of FMS' progress in reviewing the boxes and ledgers in the Hyattsville basement." Ex. 7, at ¶ 20 (Mazella Declaration). Mr. Mazella admitted that he agreed with the statement that, as of this date, both he and Ms. Falanga "knew that the destroyed boxes potentially contained potentially responsive and/or potentially relevant documents." Ex. 14, at 180-181 (Mazella Deposition). Mr. Mazella further admitted that he did not recall that anyone told Mr. Knight about the destroyed boxes and their potential relevance: "I don't recall that we said that to him" and "No, I don't recall saying that to him directly" and no one else did so, either. Id. at 181. Mr. Mazella asserted that at this meeting, Ms. Constantine and Ms. McInerney already knew about the relevance or responsiveness of the GAO boxes, since he had told them this on January 28, 1999. Id. at 183.

Mr. Wolin testified that, had he known that potentially responsive documents had been pulled at that time, "he would have called Justice right away. . . . To tell them about that and to make it clear to them that, you know, together we needed to approach the court and obviously let the court know." Ex. 17, at 91-92 (Wolin Deposition).

D. Events Occurring Between February 22, 1999 and February 25, 1999.

1. Mr. Regan's Voice-Mail Message for Ms. Constantine.

In late February, sometime prior to the February 25, 1999 meeting discussed below, Ms. Constantine declared and testified that she received a voice message from Mr. Regan advising her "that the [Hyattsville] documents were not responsive to the discovery order." Ex. 3, at ¶ 24 (Constantine Declaration).

As Ms. Constantine recalled, Mr. Regan called to let her know that he had "completed the review of the GAO documents, and there's nothing responsive in there. Give me a call if you want." Ex. 11, at 112 (Constantine Deposition). Ms. Constantine testified that "He said they were not responsive, and that's what I assumed he meant." Id.

Mr. Regan did not recall leaving this voice-mail message, let alone telling Ms. Constantine that the documents were not responsive, "because I wouldn't have said that they were not responsive. I would have said they were potentially responsive because we didn't have the names of the predecessors yet." Ex. 16, at 153-154 (Regan Deposition).

2. The Court's February 22, 1999 Contempt Order and Opinion.

On February 22, 1999, this court issued its Order and Memorandum Opinion finding Secretaries Rubin and Babbitt and Assistant Secretary of the Interior Gover in civil contempt of this court's discovery orders ("Contempt Order"). See Cobell II, 37 F. Supp. 2d 6, 9 (D.D.C. 1999). The Court also appointed a Special Master "to oversee discovery, document production, and related matters and to effectuate compliance with this Court's orders" recognizing that "[t]he Defendants simply cannot

be trusted to do this job themselves. More alarmingly, their attorneys cannot be trusted to accurately inform the court should compliance become a further issue." Id. at 37.

3. The Meetings of February 23 and 24, 1999.

On February 23 and 24, 1999, following the issuance of the Contempt Order, Mr. Knight convened "daily" meetings of the Treasury attorneys responsible for this litigation: Ms. Constantine, Ms. Falanga, Ms. McInerney, and Messrs. Lewis, Mazella and Regan. Ex. 16, at 70-71, 73 (Regan Deposition).

According to Mr. Regan, the focus of the February 23, 1999 meeting was "to understand why that [contempt finding] happened and what could be done to move forward in the case. And there was a great focus on what we considered representational issues" to have the Civil Division of DOJ replace ENRD. Id. at 79. The focus of the February 24, 1999 meeting "was more or less an update" concerning the DOJ representational issues. Id. at 80.

E. The February 25, 1999 Treasury Meeting.

In the late afternoon or early evening of February 25, 1999, the FMS and Main Treasury attorneys gathered in Ms. McInerney's office to await their "daily" meeting with Mr. Knight.[18] Since Mr. Knight was not immediately available, the six commenced discussing, among themselves, discovery-

[18] The record reveals that Ms. McInerney was not present for the entire meeting, Ms. Constantine was sporadically absent, Ex. 9, at ¶ 4 (McInerney Declaration), while Mr. Wolin was present for a few minutes only. Ex. 17, at 112 (Wolin Deposition).

related issues arising from this court's contempt order, including the Hyattsville documents. See Ex. 2, at 15-16 (Tyler Report).

Among the topics discussed was the need to perform another search of the Hyattsville documents and whether the Hyattsville documents were "responsive" or "relevant" to the Cobell litigation.

1. The Need to Perform Another Search of the Hyattsville Documents.

As noted earlier in this Report, the deponents testified as to their respective understanding of the obligations imposed upon Treasury by Paragraph 19. Notwithstanding any differences in these interpretations, the declarants unanimously agreed that the remaining boxes at the Hyattsville facility would have to be searched a second time. On that issue, Mr. Lewis "recall[ed] a further understanding that the boxes would have to be searched again once we received the names of the predecessors in interest from [Interior] and believe that this point was addressed during the discussion." Ex. 6, at ¶ 7 (Lewis Declaration). For his part, Mr. Mazella recalled "a discussion about the documents being potentially responsive" because the Hyattsville documents might have the names of the predecessors in interest, and would have to be searched again. Ex. 14, at 206-207 (Mazella Deposition). Mr. Mazella recalled having discussions with Mr. Regan about the progress of the February search, and that "he [Mr. Regan] understood certainly that the boxes would have to be searched again once we knew who the predecessors in interest were . . . because the court was, you know, viewed paragraph 19 as being, and, rather than, or." Id. at 145. Mr. Regan confirmed that "[t]here was a recognition and understanding among the group that the remaining Hyattsville records would have to be searched again whenever Treasury received the names of the predecessors in interest." Ex. 10, at ¶ 9 (Regan

Declaration). Ms. Falanga recalls that during the February 25 meeting,: "[w]e also discussed the fact that these documents were not responsive to the five named plaintiffs but that depending on the Court's decision regarding predecessors in interest, they could be responsive and would have to be searched again." Ex. 5, at ¶ 11 (Falanga Declaration).

From the perspective of Main Treasury, Ms. Constantine testified that she understood that, contrary to Mr. Regan's assertion, the need to go through Treasury documents again did not apply to the Hyattsville boxes: "Well, my reaction [to Mr. Regan's declaration] is that we did recognize, understand that there was a group of documents that would have to be searched again whenever we received the names of the predecessors in interest. But my understanding was that the GAO documents were definitely not in that category." Ex. 11, at 153 (Constantine Deposition). In that vein, Ms. Constantine rejected Mr. Mazella's testimony that she had asserted that the Hyattsville documents would have to be searched again once the predecessors in interest were known: "I have no recollection of saying that. It doesn't make sense that I would say that. My understanding of the documents was that they didn't have anybody's names on them, so what would be the point of doing that?" Id. at 155-156.

Finally, Ms. McInerney, in her declaration, relayed her understanding that there was no need to do another page-by-page search through the boxes, since, "[o]ne of the FMS lawyers (I do not recall specifically which one) stated his view that we did not need to do so because the overwhelming number of documents in the boxes did not relate in any way to the Department of Interior." Ex. 9, at ¶ 4 (McInerney Declaration).

2. The Debate Concerning Responsiveness versus Relevance and Concerning Disclosing the Destruction of the Documents.

(1) Randall Lewis. Mr. Lewis declared that the February 25 meeting was the "only one informal meeting at which the Hyattsville boxes were discussed at length." Ex. 6, at ¶ 7 (Lewis Dec.). He recalled that his "discuss[ion] [of] the on-going review and summarization of documents available at Federal Records Centers, and [] James Regan[']s [] summary of the review of the remaining boxes at Hyattsville." Id.

Acknowledging that, in the event that responsive or potentially responsive documents were destroyed, "there would be an affirmative duty" to inform the Court or DOJ or Plaintiffs of the destruction, Ex. 13, at 144 (Lewis Dep.), Mr. Lewis did not recall any discussion at this meeting concerning the difference between responsive and potentially relevant documents. He attributed this lack of recollection to the fact that he had just finished his major presentation to this group, and was "thinking about what I needed to do based on our conversation about my documents and I just wasn't as focused on the rest of the conversation as others." Id. at 220-221.

Regarding the discrepancy between Ms. Constantine and the other participants as to the discussion of the Hyattsville documents, Mr. Lewis opined that "it's conceivable — is that she truly did have a misunderstanding of the nature of documents, but I can't believe, given that I know that those of us from FMS knew the nature of the documents and knew that they had to be reviewed again with regard to the predecessors in interest . . . . [and were] potentially responsive . . . . [and] were relevant." Id. at 231. Notwithstanding, "we [in FMS] understood that distinction, and we knew that they had to be reviewed again . . ." Id. at 232.

(2) Daniel Mazella. In his declaration, Mr. Mazella recounted that, during this meeting, "Ms. Constantine stated the position that she has consistently taken with respect to the Hyattsville boxes, which is that the documents that were found were not, as far as can be determined, responsive to the Court's November Order. However, according to Ms. Constantine, Treasury would search the Hyattsville documents again once Treasury knew the identities of the predecessors in interest." Ex. 7, at ¶ 22 (Mazella Declaration). Regarding the subject of disclosure, Mr. Mazella recalled that, "Ms. Falanga raised the issue of whether Justice should be told about the destruction of the boxes at that time and there was some discussion (it was Ms. Falanga's view that disclosure should be made at that time) . . ."

Mr. Mazella insisted that, "[a]t no time . . . has any Treasury lawyer suggested in my presence that no disclosure of the disposal of the Hyattsville boxes should be made to the court, Justice, or Plaintiffs." Id.

(3) James Regan. Mr. Regan "d[id] not recall a specific discussion regarding the disclosure of the Hyattsville documents outside of Treasury during this meeting." Ex. 10, at ¶ 9 (Regan Declaration). During the meeting, however, Mr. Regan "wanted to make two points: one is what the search was, what the search parameters were, so everybody was clear on that. . . . because we didn't have the names of the predecessors. And, two, I wanted to make sure everybody knew what the search results were. One is that we didn't find any documents referencing the five named plaintiffs, but that we did find a smaller number of documents representing — referencing IIM or individual monies." Ex. 16, at 121-122 (Regan Deposition).

Mr. Regan testified that his reason for clarifying that the Hyattsville documents were potentially responsive is "because I felt that people were too relieved that those five named plaintiffs' documents weren't found. So I clarified that they were potentially responsive . . ." Id. at 127.

As to the destruction between potentially relevant and potentially responsive documents, Mr. Regan opined that "potentially relevant are documents that relate to the accounting portion of the complaint, regarding an accounting of the IIM deposit fund account, 14X6039. Whereas responsive documents would be documents that specifically referenced the five named plaintiffs or the predecessors in regards to their IIM accounts." Id. at 136-137.

Mr. Regan emphasized the point that "it wasn't a question of whether Treasury was going to disclose the matter. It was a question of if and when." Id. at 186. For his part, Mr. Regan "thought that they should be disclosed . . . And every time I was given the opportunity, I tried to bring it up." Id. at 190.

(4) Ingrid Falanga. Ms. Falanga recounted that the assembled attorneys, "began discussing the GAO documents with Ms. Constantine and how we should inform the Court about the destruction of the GAO boxes. To the best of my recollection, Ms. Constantine responded that since the boxes did not contain responsive documents, we did not have to tell the Court immediately. I expressed a different point of view and we had a colloquy about discovery obligations. Mr. Regan interjected that these documents were 'potentially responsive' . . . . We also discussed the fact that these documents were not responsive to the five named plaintiffs but that depending on the Court's decision regarding predecessors in interest, they could be responsive and would have to be searched again." Ex. 5, at ¶ 11 (Falanga Declaration).

Ms. Falanga stated that during the meeting Mr. Regan "described the documents as potentially responsive to an accounting, when they were actually potentially relevant to an accounting," and she further stated that she corrected Mr. Regan on this point at the meeting. Ex. 12, at 131-132 (Falanga Deposition).

Ms. Falanga explained that, in her view, the potentially responsive category applies to documents related to the five named plaintiffs and their predecessors in interest; while the potentially relevant latter category applies to all documents which would assist in "an accounting." It was not until Treasury knew the names of the predecessors in interest could they determine whether the documents "were potentially responsive, but at the end of the day, they were potentially relevant and should be turned over." Id. at 151-152.

Ms. Falanga testified that Ms. Constantine asked about the Hyattsville boxes, and Mr. Regan explained the search parameters. Ms. Constantine "was making a statement that the bottom line was that we didn't have any responsive documents;" Mr. Regan then said that these documents were "potentially responsive," to which Ms. Constantine responded, "[b]ut you just told me that you didn't find anything with the five named plaintiffs," to which Mr. Regan talked along the lines of "[y]eah, but there's predecessors in interest." Id. at 150-151.

Ms. Falanga testified that during the conversation about responsiveness and relevance, she asked, "[h]ow are we going to tell the court?" Ms. Falanga stated that Ms. Constantine's reply was "an argument" about only telling the court about responsive documents, and only having to look where you thought there would be responsive documents, which "didn't make sense to me." Ms. Falanga told Ms. Constantine that she didn't agree with this explanation, and she "told her we didn't want to look like

Interior . . . not to be accused of deliberately destroying documents." Id. at 152-153. Ms. Falanga reiterated that "we didn't want to look like Interior," and that Treasury "had been instructed [by Mr. Knight] to treat Justice and Interior as adversaries." Id. at 172-173.

Ms. Falanga testified that Ms. Constantine's strategy of non-disclosure was "just dig[ging] yourself deeper into a hole, but, again, Eleni [Constantine] is from Williams and Connolly" and the "strategy" that she and Andrew Eschen [DOJ] shared was "[n]ot revealing it, not running to the Court and saying, '[g]uess what, Your Honor? Our client screwed up and destroyed more documents.' That's what I would have done . . ." Id. at 174. Ms. Falanga compared Ms. Constantine's response in this instance to her response to microfilm incident: "In my mind, Eleni was doing the same thing Justice had done the last time, documents, microfilm, was destroyed . . . not reporting it immediately, finding a way to report it." Id. at 170.

Ms. Falanga asserted that this meeting was the first time that she had "explicitly" raised with Ms. Constantine and Ms. McInerney the need to raise the destruction of the Hyattsville boxes with the court. Id. at 154. In response to Ms. Constantine's claimed lack of recollection of the decision not to disclose, Ms. Falanga found Ms. Constantine's "subsequent lapse of memory about the issue very troubling . . . unbelievable," since "I didn't think at first that she was not going to disclose the destruction." Id. at 200.

(5) Eleni Constantine. Ms. Constantine testified that the FMS attorneys, including Mr. Regan, "were probably quite focused on the five named plaintiffs," whereas she had a different mind set, arising from the contempt hearing, "when I thought about responsive documents, even though we didn't have the names of the predecessors in interest, I had a pretty big category of what was responsive

documents. It was anything that could be identified to an individual because we didn't know who the predecessors in interest were." Ex. 11, at 114 (Constantine Deposition). Ms. Constantine "believe[d] that they [FMS] were operating under the same definition of responsive that I was; that is, it included anything that would be identifiable to an individual." Id. at 142.

When Mr. Lewis began itemizing various documents as being responsive, however, Ms. Constantine recalled being "quite alarmed . . . it sounded like he was telling me we have these other categories of responsive documents that nobody had told me anything about before." Id. at 143. Ms. Constantine then stepped in to clarify the definitions: "'[n]ow, let's be clear on what our definitions are. Responsive documents are anything that's identifiable to an individual,' and I said, 'We don't, you know we have the five named plaintiffs' names. We don't know who the predecessors in interest are. Therefore, we have to treat anything that's identifiable to any individual as a responsive document right now.'" Id.

Ms. Constantine then testified that all the attorneys present should have understood her definitions, since "I wanted to have clear terminology, so that when we spoke to each other, we would not have a misunderstanding." Id. at 144. Therefore, according to Ms. Constantine, when Mr. Regan spoke, "he certainly wasn't using the definition that I had just articulated and that was in my mind." Id. Ms. Constantine testified as to her puzzlement about Mr. Regan's having misunderstood her definition of responsiveness: "It doesn't make sense to me that he could have possibly said they were not responsive . . ." Id. at 145-146.

Ms. Constantine did "not recall any discussion about informing [DOJ] of the loss of some of these documents at that time. What I recall is a discussion and a general agreement to disclose the facts

about these documents on the list of potentially relevant but not responsive documents that we would soon be sending to Plaintiffs and the court." Ex. 3, at ¶ 26 (Constantine Declaration).

Conceding that "there was a discussion about disclosure" of these documents "on the list of potentially relevant but not responsive documents," Ms. Constantine nonetheless insisted that they did not discuss these documents as being responsive: "No, I didn't know the documents were potentially responsive, and had I known that, I would have behaved differently, as I did when I, in fact, found out that they were potentially responsive." Ex. 11, at 148-149 (Constantine Deposition).

Ms. Constantine concluded her testimony on this point by stating that: "[w]e made a decision to disclose it in the list of potentially relevant documents that we were preparing. We said at the end of the meeting that all information that we discussed in the meeting, including the GAO boxes, should go on the list, and including the fact that some of these documents had been destroyed." Id. at 163.

(6) Roberta McInerney. As did Ms. Constantine, Ms. McInerney understood "that the GAO boxes (including the 162 discarded boxes) were not responsive to any outstanding document production order because of their very nature. I also remember feeling a great sense of relief after the meeting due to my belief that the [documents] . . . were not responsive to any court order." Ex. 9, at ¶ 4 (McInerney Declaration).

Ms. McInerney testified that the issue of responsiveness was not the focus of this meeting, since she and others understood that the Treasury checks were the only responsive documents that Treasury had. Ex. 15, at 134 (McInerney Deposition). Ms. McInerney explained that when she returned to the room, Mr. Lewis was finishing his explanations of the various categories of FMS documents, "[a]nd so he got done with that and the meeting started to break up, and I said, '[w]ell, wait a minute. Have we

talked about the GAO boxes?' and everybody said, '[o]h yeah, we've talked about the — we've already talked about the GAO boxes. We're done with that.' . . . And I said, 'Getting to the bottom line, any responsive documents? Are they responsive?,' and James Regan said no." Ms. McInerney emphasized, "He answered no, with one word." Id. at 139-140.

Ms. McInerney testified that she did not inform DOJ about the document destruction, since she understood that "if they had in fact been summary-level accounting information, they wouldn't have even been relevant to the case." Id. at 150-151.

Although Mr. Wolin was not present during the debate over the difference between responsiveness and relevance, he testified that "responsive meant is there anything here that was responsive to the discovery order." Ex. 17, at 118 (Wolin Deposition).

3. Colloquy Between Mr. Regan and Mr. Wolin.[19]

(1) Randall Lewis. Mr. Lewis declared that, during Mr. Regan's discussion of the Hyattsville boxes, Mr. Wolin "joined the discussion briefly and asked about the Hyattsville boxes. My recollection is that Mr. Regan stated that the remaining boxes had been searched page-by-page and that we had not found any documents responsive to the five named plaintiffs." Ex. 6, at ¶ 7 (Lewis Declaration).

During his deposition, Mr. Lewis elaborated that it was Ms. Constantine who raised the discussion of the Hyattsville documents: "[a]t that point, everyone's primary concern . . . is whether they

[19] As a prefatory note, the deponents differed as to whether Mr. Wolin alone asked Mr. Regan about the Hyattsville documents, or whether Ms. McInerney asked the initial question, followed by Mr. Wolin's query. However, it is Mr. Regan's answers, and not the identity of the questioners, that is important.

found any references to the five named plaintiffs. . . . The primary concern was whether there were any documents responsive to paragraph 19." Ex. 13, at 100-101 (Lewis Deposition). Specifically, Mr. Lewis recalled that Mr. Regan was directly asked both by Eleni [Constantine] and again by Neal [Wolin], when he stuck his head in, whether they found any documents responsive with regard to the five named plaintiffs." Id. at 101.

Mr. Lewis disputed that portion of Ms. Constantine's recollection that Mr. Regan responded that the documents were not responsive to the November 1996 order, because "I don't believe that James stated it that broadly. . . . I believe Mr. Regan limited it to the five named plaintiffs." Id. at 103, 107.

Mr. Lewis recalled Ms. McInerney asking whether or not the GAO boxes contained any documents responsive to any outstanding document production order, and Mr. Regan responding no." Mr. Lewis agreed that Mr. Wolin came in and also heard Mr. Regan's negative answer. Id. at 109-110 & 221-222. Mr. Lewis stated that this answer "[w]ithout proper context, it would have been — it probably would have been misleading to Mr. Wolin." Id. at 137.

(2) Daniel Mazella. Mr. Mazella recalled that, "[a]mong other topics, the group discussed the result of the review of the Hyattsville boxes, which had been completed the week before. Mr. Wolin had stopped by briefly. Mr. Wolin asked Mr. Regan how he knew that there were no documents relating to the five named plaintiffs in the Hyattsville boxes that were not destroyed. Mr. Regan replied that he had gone through the boxes page by page." Ex. 7, at ¶ 21 (Mazella Declaration).

During his deposition, Mr. Mazella expanded upon this colloquy: "Ms. Constantine first said something to the effect of what about the GAO boxes," to which Mr. Regan replied, "something to the

effect that the search of the boxes had been completed and that he had found no documents relating to the five named plaintiffs." Ex. 14, at 178, 185 (Mazella Deposition). Mr. Wolin then entered the room, heard Mr. Regan's response, and asked "well, how do you know," and Mr. Regan replied, "because I went through the documents page-by-page," and Mr. Wolin in response, "I think he said, good answer." Id. at 190.

Mr. Mazella admitted that Mr. Wolin probably did not know that two boxes worth of files had been pulled, "I don't know whether or not the significance of the search and the results of the search were explained to him," or if he was told, "he may not have appreciated the impact." After Mr. Wolin left the room, Mr. Regan then mentioned that they had pulled two boxes worth of files. Id. at 188-189. What was clear from Mr. Mazella's testimony was that no one at the meeting clarified this aspect for Mr. Wolin. Id. at 220-221, 223-224.

(3) James Regan. According to Mr. Regan, "[d]uring Mr. Lewis' discussion [of the Federal Records Center documents] the issue was raised about whether the Hyattsville documents were responsive or potentially relevant." Ex. 10, at ¶ 9 (Regan Declaration). Mr. Regan explained how the page by page review was done, and "that a relatively small number of documents referencing IIM or individual monies were pulled from the remaining boxes, but that no documents identifiable to the five named plaintiffs were pulled." Id. Mr. Wolin then "asked how I knew that no documents referencing the five named plaintiffs were included in the remaining Hyattsville documents. I replied that we had conducted a page by page search of the remaining documents and found no documents identifiable to the five named plaintiffs. He said 'good answer.'" Id.

Mr. Regan was emphatic in his testimony that Mr. Wolin's exact question was: "[h]ow do you know that none of the remaining boxes have any documents referencing the five named plaintiffs?" Ex. 16, at 124 (Regan Deposition). Mr. Regan admitted, however, that Mr. Wolin, in asking the question and hearing his response, was not fully informed as "I do not believe that he was in that room during my clarification regarding the potentially responsive, potential responsiveness of the documents." Mr. Regan believed that he "had adequately" informed Mr. Wolin of this by telling the rest of the group (i.e., all but Mr. Wolin) "that they were potentially responsive." Id. at 141-142. Mr. Regan could not recall anybody in the room informing Mr. Wolin that the documents were potentially responsive. Id. at 142-143.

Mr. Regan admitted that, without elaboration, the answer "no" to Mr. Wolin's query would be misleading: "I think it would . . . need to be limited to the five named plaintiffs for it not to be misleading. And I recall Mr. Wolin's question was limited to the question regarding whether we found any documents responsive to the five named plaintiffs and I responded that . . . the remaining boxes did not contain any documents responsive to the five named plaintiffs. I don't believe that was misleading." Id. at 151.

Mr. Regan rejected Ms. Constantine's declaration on this point: "I think that she has a different recollection than I do. My testimony is that I responded, specifically related that we did not find any documents related to the five named plaintiffs." Id. at 162. He emphasized that "I recall Mr. Wolin qualifying his question to the five named plaintiffs. I responded in accordance with that. That is specifically that my response was it's specifically limited [to] the five named plaintiffs and that's what I remember." Id. at 164.

Mr. Regan similarly rejected Ms. Constantine's statement that "I said, that they were by the very nature, by their nature, not responsive. I did not say that. I do not recall saying that." Id. at 164-165.

(4) Ingrid Falanga. Ms. Falanga recalled that when Ms. McInerney and Mr. Wolin entered the room and Ms. McInerney asked whether the documents were responsive, "Mr. Regan stated that there were no responsive documents in the GAO boxes. Mr. Wolin asked Mr. Regan how he knew that and Mr. Regan responded that we had gone through the boxes page by page." Ex. 5, at ¶ 11 (Falanga Declaration).

Ms. Falanga expanded upon this in her deposition testimony, stating that it was Ms. McInerney who first entered the room and asked whether the documents were responsive – which was understood by the other attorneys present to mean the five named plaintiffs. Ex. 12, at 157, 159 (Falanga Deposition). When Mr. Wolin entered the room shortly thereafter, "I believe that Roberta said to him [Mr. Wolin] they didn't find any responsive documents, and he said, 'How do you know?,' and James [Regan] said, 'Because I searched them page by page,' and he [Wolin] said, 'Good answer.'" Mr. Wolin was present for "five or six minutes." Id. at 159.

Ms. Falanga claimed that Mr. Wolin knew or "should have" known that their use of "responsive" was limited to the five named plaintiffs. Id. at 161. Ms. Falanga further claimed that Mr. Regan's answer, "that we hadn't found any documents responsive to the five named plaintiffs," "had to be a full answer because it was always a qualified answer because we still had to deal with the predecessors in interest." Id. at 161-162.

(5) Eleni Constantine. According to Ms. Constantine, Mr. Wolin walked in and asked about the GAO documents, "Mr. Regan responded that the documents were not responsive to the November

1996 order." To Mr. Wolin's follow-up question, Mr. Regan "answered that he had looked at the documents and that they were by their nature not responsive." Ex. 3, at ¶ 26 (Constantine Declaration).

Ms. Constantine testified that, prior to Mr. Wolin's arrival, "I recall that James [Mr. Regan] started describing the search that they had done of the documents, and he said they had been very thorough, that there were a large — I think he gave us a number — of extant boxes and that they had gone through them page by page. And somewhere right about this point in his discussion Neal Wolin came in and . . . had heard enough about the documents to figure out what documents they were talking about, and he said, '[o]h yes. What happened about the GAO documents?' It was a general question like that." Ex. 11, at 134-135 (Constantine Deposition).

Ms. Constantine recounted that Mr. Wolin, upon hearing Mr. Regan's "No," asked the follow-through question, "[h]ow do you know about that? . . . And James [Regan] said, 'We looked through them page by page.' And Neal [Wolin] said something like, 'Well, that's great.' He was obviously pleased with the answer. . . . He was pleased at the result, not just at the process." Id. at 138. Ms. Constantine agreed that Mr. Wolin "wouldn't have been as sanguine . . . nor would Roberta [McInerney]" had they known that Mr. Regan's answer was incomplete and that since two boxes worth of files containing Indian or IIM documents had been found and segregated. Id. at 139-140.

Ms. Constantine dismissed Mr. Regan's recollection of this colloquy as being "very unlikely." Id. at 137.

(6) Roberta McInerney. Ms. McInerney, in her declaration, stated that, "[i]n an effort to get to what I perceived as the 'bottom line' issue with respect to the Hyattsville records, I asked the lawyers in the room whether or not the 'GAO boxes' contained any documents responsive to any outstanding

document production order. I cannot recall which FMS lawyer answered the question, but one of them responded 'No.'" Ex. 9, at ¶ 4 (McInerney Declaration). Ms. McInerney declared that, concerning Mr. Wolin, "I recall that he also heard the negative answer to the question about whether or not the Hyattsville records were responsive to any outstanding document production order." Id.

Ms. McInerney subsequently admitted that "nobody spoke up" in response to Mr. Regan's answer to Mr. Wolin's question, which was "an incorrect answer in and of itself" and was also misleading. Ex. 15, at 158-160 (McInerney Deposition).

(7) Neal Wolin. According to Mr. Wolin, when he entered Ms. McInerney's office to inform the attorneys that Mr. Knight would not be able to convene the "daily" meeting, he testified that "[i]t was clear that there was a discussion going on about the Hyattsville boxes. And, again, somewhat sheepishly in sort of my inimitable fashion, I interrupted everything that was going on and I said, you know, is there anything potentially responsive, is there anything responsive in these documents, in those boxes? And the answer that came back was, no. Just there was nothing responsive." Ex. 17, at 112 (Wolin Deposition). Mr. Wolin explained that Mr. Regan's response "was a flat response . . . there was no ambiguity. . . . There was no conditions attached to it. There were no sort of subject, you know, it was flat." Id. at 113.

Jarred by the fact that "it's not often that you get a flat answer," id., Mr. Wolin asked Mr. Regan, "[w]ell, how do you know that?" id., to which Mr. Regan responded: "I looked at them page-by-page. I did a page-by-page review or something, page-by-page." Id. at 114. Mr. Wolin recalled that he then "got up and said, good answer, and walked out." Id. Mr. Wolin testified that none of the attorneys present offered any exceptions or qualifiers to Mr. Regan's responses and accordingly, he left

the meeting unaware that individual names had been found among the remaining boxes at Hyattsville. Id. at 116-117.

Mr. Wolin firmly rejected Mr. Regan's assertion that he had asked a question about or limited to the five named plaintiffs: "No, I didn't ask anything in particular about the five named plaintiffs." Id. at 120. Mr. Wolin equally rejected Mr. Regan's contention that he qualified his answers in any way, "[h]e didn't — there was no qualification to his answer." Mr. Wolin explained that he enjoys a well-founded reputation for vigilantly pursuing a line of questioning: "I know that if I had gotten a question that left open the possibility of some issue having remained on the table, I wouldn't have walked out of that room until I had understood what the issue was, until I had tasked out an approach for proceeding forward or until I, you know, issued some instruction about how to proceed or something. And I asked a very flat, as I said, a very flat question. I got a very flat answer. It was so flat, in fact, that I asked a follow-up because I'm not used to getting flat answers, especially in complicated situations." Id. at 122-123.

Mr. Wolin explained that he would not have asked a question limited to the five named plaintiffs, because the answer thereto "isn't a particularly important answer. . . . What mattered was, was there anything there that was possibly potentially responsive." Id. at 124-25. "It wouldn't have made sense for me to ask about the five named plaintiffs . . . . And if I had gotten an answer that had talked about the five named plaintiffs, but suggested that there were other predecessors in interest or anything else that might have been responsive, which would have necessarily definitionally constituted a partial answer, I would not have asked, 'How do you know that?' because it wouldn't have been consequential to ask that. . . . I wanted the bottom line and I wanted to know, you know, the full answer to the question, you

know, is there something there that is potentially responsive that we need to notify the Court about?" Id. at 130.

Mr. Wolin considered the declarations of Messrs. Lewis, Mazella and Regan regarding his colloquy with Mr. Regan to be incorrect. As to Mr. Regan's declaration, Mr. Wolin testified that it "seems quite palpably not right. . . . untrue." Id. at 125. Regarding Mr. Mazella's declaration, "[t]his is the same rendition as Regan's, and it's not what I asked and not what I got in response." On this point, Mr. Wolin had "no doubt, none" that Mr. Mazella's declaration was inaccurate on this issue. Id. at 128-129. Mr. Lewis' declaration was also incorrect about this event: "I mean, it just wasn't what was asked and answered when I was in the room." Id. at 129.

Mr. Wolin concluded that "information that was critical for Main Treasury lawyers to know and for Justice lawyers to know and, in turn, obviously the Court to know, was not brought forward in a way that was either clear or understood or heard." Id. at 136-137. Mr. Wolin considered this lack of communication as a systematic failure to let us know what was going on in a way that . . . we needed to know." Despite his efforts, and the opportunities for the FMS attorneys to speak up, they "never" raised these issues. Id. at 141-142.

VI Missed Opportunities by Treasury to Disclose the Destruction of the Hyattsville Documents.

This investigation revealed that Treasury attorneys failed to disclose the destruction of the Hyattsville documents to Main Treasury, Department of Justice, Plaintiffs, the Special Master and the Court, notwithstanding myriad opportunities to do so. These opportunities included: (1) a meeting held with DOJ attorneys on February 25, 1999; (2) status conferences and motions hearings from February

to April of 1999; (3) in the March 16, 1999 "Defendants' Motion to Strike or Reject Plaintiffs Proposed Orders Regarding Document Retention" and in the March 19, 1999 "United States' Memorandum Addressing Plaintiffs' Proposed Order Regarding Document Retention;" (4) in the March 26, 1999 "United States' Statement of Discovery Priorities and Response to Plaintiffs' Statement" and the attached "Department of the Treasury Cobell Litigation Document Production Protocol;" (5) in the April 12, 1999 "Response to Plaintiffs' Motion for Entry of a Proposed Order Regarding Document Production;" (6) in the May 3, 1999 "Defendant Secretary of the Treasury's Motion for Summary Judgment."[20] In addition, no effort was made to disclose the matter to the Inspector General's office within the Department of Treasury.

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[20] As a threshold matter, it must be noted that the declarants met regularly among themselves during this time period. There is some conflict, however, as to whether, and how, the disclosure of the Hyattsville documents was raised during these meetings. For example, Ms. Constantine declared that, after she was formally tasked to assume lead responsibility within Treasury for this litigation (on March 15, 1999), she scheduled weekly meetings (usually on Monday afternoons), but "at none of these weekly meetings did any one raise any issue about the GAO documents." Ex. 3, at ¶¶ 28-29 (Constantine Declaration). Mr. Lewis, on the other hand, asserted that, from approximately February to April of 1999, that there were daily meetings of the FMS attorneys, and weekly meetings with Ms. Constantine and Ms. McInerney, and "I recall that numerous meetings included specific discussions of the status of the review of documents, including the Hyattsville documents." Ex. 6, at ¶ 8 (Lewis Declaration).

In addition to these meetings, several of the declarants participated in weekly conference calls with the DOJ attorneys assigned to this case. Mr. Regan testified that "I don't recall any discussion of the Hyattsville boxes" during these weekly conferences with DOJ, and, "to the best of my knowledge, it was never raised in a meeting, at one of those conference calls, that I was present." Ex. 16, at 77-78 (Regan Deposition).

A. Failure to Disclose to DOJ During a February 25, 1999 Meeting.

Ms. Constantine testified that, in the afternoon prior to the aforementioned February 25, 1999 meeting at Main Treasury, there was a "contentious" meeting at DOJ with the attorneys from Treasury (Ms. Constantine, Ms. Falanga, and Messrs. Lewis, Mazella and Regan) and with attorneys from the Department of the Interior, to plan their responses to this court's contempt order. Ex. 11, at 123-125 (Constantine Deposition). Ms. Constantine admitted that the issue of the destroyed Hyattsville documents did not come up, and none of the FMS attorneys raised it, although "I think that they should have." Id. at 126-127, 130.

B. Failure to Disclose at the Status Conferences.

Other missed opportunities to disclose the destruction of the Hyattsville documents included the monthly status conferences convened by the Court. As the Court noted, even prior to the January 1999 contempt hearing, a Treasury attorney was usually present at these status conferences. Cobell II, 37 F. Supp. 2d at 18 ("[m]oreover, the Department of the Treasury sent an agency lawyer, Daniel Mazella, to nearly all of the status conferences in this case.").

After learning of the document destruction, the following Treasury attorneys attended the following status conferences and motions hearings:

(1) Tuesday, February 16, 1999 (Daniel Mazella)

(2) Tuesday, March 23, 1999 (Eleni Constantine)

(3) Tuesday, April 13, 1999 (Eleni Constantine, Daniel Mazella)

Ms. Constantine or Mr. Mazella could have disclosed the document destruction on any of these occasions but chose not to do so.

C. Failure to Disclose in the March 16, 1999 "Defendants' Motion to Strike or Reject Plaintiffs Proposed Orders Regarding Document Retention," and in the March 19, 1999 "United States' Memorandum Addressing Plaintiffs' Proposed Order Regarding Document Retention."

On March 4 and 11, 1999, Plaintiffs filed their Proposed Orders regarding Document Retention.[21] The revised order of March 11, 1999 requested "that Defendants [] immediately take all steps necessary to preserve and protect all records of any kind related in any way whatsoever to any and all past or present individual Indian trust accounts and all assets of any kind held now or at any time in trust for the benefit of individual Indians, and Defendants shall retain such documents . . ." and further requested "that Defendants shall take all steps necessary to ensure that all such trust records and other information in the custody, control, or possession of Defendants . . . are so preserved, protected, and made readily available."

1. Defendants' March 16, 1999 Motion to Strike.

On March 16, 1999, Defendants moved to strike Plaintiffs' proposed order, largely on procedural grounds. Ms. Falanga and Mr. Mazella were both listed as "of counsel" on this motion. In their Motion to Strike, Defendants asserted that they: "do not challenge the Court's authority to ensure the preservation of evidence. Nor do they deny their obligations to take all reasonable steps to retain relevant documents or other information, which they have done." (Memorandum, at 7-8) (emphasis in original). In a footnote, Defendants added that: "[m]ultiple directives have been issued by . . . Treasury

[21] The only significant difference between the two proposed orders is the explicit inclusion of computers and related electronic devices in the revised order.

management to the offices that control records. These will be discussed in Defendants' March 19, 1999, filing regarding document retention policies and/or practices." (Memorandum, at 8 n.5).

2. Defendants' March 19, 1999 Memorandum.

On March 19, 1999, Defendants filed their "Memorandum Addressing Plaintiffs' Proposed Order Regarding Document Production." Ms. Falanga and Mr. Mazella were again listed as "of counsel."

In the introduction to the attached Memorandum, Defendants asserted that "the Department of Treasury recognize[s] the importance of document retention. . . . There is no question that the retention of these documents is of primary importance in this litigation." (Memorandum, at 2). Defendants then argued that "Plaintiffs' proposed Order is unwarranted. There are government-wide policies and practices that require the retention of these documents." (Memorandum, at 2). More specifically, on pages 6 through 8, Defendants set out the "Steps Taken By the Department of the Treasury to Preserve Documents," including: (1) the actions taken in 1996 after this litigation was filed, including those taken by Steve Laughton; (2) the discovery of the microfilm destruction in 1997, and the responses thereto; (3) the "freeze" placed on Treasury's records at the Federal Record Center (Suitland, Maryland); (4) the inventory by the Bureau of Public Debt of its records and the steps taken to preserve them;[22] and (5)

[22] The attached affidavit of Keith Rake, Deputy Assistant Commissioner, BPD (Defendants' Exhibit 10), noted the 1996 transfer from FMS to BPD of "some records relating to IIM account investment and redemption transactions." However, this affidavit did not disclose the aforementioned "missing box" problem that occurred during the transfer of these records from FMS-Hyattsville to Parkersburg, West Virginia.

the February 1, 1999 memorandum issued by FMS Commissioner Gregg regarding the need to preserve IIM-related documents.

However, the Hyattsville document destruction was not mentioned.[23]

D. Failure to Disclose in the March 26, 1999 "United States' Statement of Discovery Priorities and Response to Plaintiffs' Statement" and the Attached "Department of the Treasury Cobell Litigation Document Production Protocol."

1. Defendants' March 26, 1999 Statement.

On March 26, 1999, Defendants filed with the Special Master the "United States' Statement of Discovery Priorities and Response to Plaintiffs' Statement," with the attached "Department of the Treasury Cobell Litigation Document Production Protocol." As before, Ms. Falanga and Mr. Mazella were listed as "of counsel."

The purpose of this pleading was threefold: (1) to describe the Defendants' discovery priorities; (2) to respond to the Plaintiffs' March 4, 1999 "Discovery Priority List;" and (3) to describe the Defendants' document production protocols for the five named plaintiffs and their predecessors in interest. This last category is directly relevant to this Report.

The "Department of the Treasury Cobell Litigation Document Production Protocol" is six pages in length, with an attached eight-page "Questionnaire and Certification in Support of the . . . Protocol,"

[23] Mr. Mazella declared that while he and Ms. Falanga were drafting responses to the Preservation Order, they "raised the issue with Ms. Constantine of whether the disposal of the Hyattsville boxes should be disclosed." Mr. Mazella recalled that "Ms. Constantine said no, disclosure was not necessary, since documents that were found were not, as far as can be determined, responsive to the court's November Order." Ex. 7, at ¶ 23 (Mazella Declaration).

intended to be filled out by Treasury records management staff. This Protocol begins by stating the language in Paragraph 19 and reiterating that Treasury "has produced all records and data responsive to paragraph 19 that are identifiable to the five named plaintiffs," (Protocol, at 1), and "is focused on the production of documents responsive to Paragraph 19 that are related to the predecessors in interest . . ." (Protocol, at 2).

In the definitions section, Treasury defined "responsive documents" as those "that correspond to information identified by Interior as responsive to paragraph 19," while "relevant documents" were defined as "summary level accounting information . . . referring to, or relating to, IIM deposit fund account 14x6039." (Protocol, at 3).[24]

The Protocol concludes with a "List of Documents Potentially Relevant to IIM Deposit Fund Account 14x6039." Three standard forms ("SF") were described, along with the "Investment/Redemption Requests" and the "Transaction Confirmations."

On pages 16-19, which summarized the Treasury Department's Protocol, attached as Exhibit 3, Treasury made four representations: (1) that Treasury will provide "a list of the Treasury documents and records that, although not responsive to Paragraph 19, may be relevant to the Plaintiffs' complaint concerning accounting of the IIM trust funds;" (2) that Treasury still needs identifying information to locate individual checks and payment records; (3) that Treasury has produced all "payment records" regarding the five named plaintiffs; and (4) that "Treasury completed its document production efforts in

[24] It must be noted that neither definition would encompass the Hyattsville documents, since "responsive" is limited to those records triggered by information received from the Department of the Interior while "relevant" includes only summary-level information, not data relating to individual payees.

November and December, 1998." This narrative summary omits any mention of the existence Hyattsville documents, their destruction, or their potential responsiveness and/or relevance.

a. The Treasury Attorneys Draft Their Responses to the Proposed Order and Prepare the Document Production Protocol.

Ms. Falanga declared that, prior to one of the weekly DOJ conference calls, "Ms. Constantine called and asked what we were going to discuss. I asked her if she wanted to raise the issue of the GAO boxes and she stated that she did not want to raise it for the first time with the entire group on the line." Ex. 5, at ¶ 12 (Falanga Declaration). Regarding the document destruction disclosure in Treasury's response to Plaintiffs request for a proposed order, "Ms. Constantine disagreed and only a reference to preserving information about 'canceled payments' was made in our response." Id. at ¶ 13. Ms. Falanga further recounted that, "while Mr. Regan was preparing the Protocol, we [FMS attorneys] raised the issue of putting the destruction of the GAO boxes in the Protocol with Ms. Constantine. Ms. Constantine stated that she did not believe that this issue belonged in the Protocol and wanted it put in the supplement to the Protocol . . ." Id. at ¶ 15.

Ms. Falanga testified that she believed that Treasury's response to Plaintiffs' order "is an appropriate vehicle in which to discuss the destruction of the documents and the remaining documents," but that Ms. Constantine disagreed. Ex. 12, at 189 (Falanga Deposition).

Mr. Lewis recalled that Mr. Regan raised the issue as to whether disclosure should be made with "regard to the document production protocol." Ex. 13, at 161 (Lewis Deposition). Specifically, "at one point, the protocol was going to have a very extensive attachment . . . . And at one point I believe it [disclosure] was going to be included with that, and I'm not sure how — my understanding is that that

ended up not being attached that Eleni [Constantine] had decided that we would separately send a letter to the Plaintiffs with the table attached, and that it would be in there." Id. at 162.

Mr. Mazella stated that "[d]uring the drafting of the March 26, 1999 filing . . . . Ms. Falanga, Ms. Constantine and I discussed on the telephone on March 26, 1999 whether the existence and disposal of the Hyattsville boxes should be disclosed. For the same reasons explained in paragraph 23 above, Ms. Constantine said no." Ex. 7, at ¶ 24 (Mazella Declaration).

Mr. Regan testified that he was assigned to oversee the preparation of the Protocol. Ex. 16, at 59-60 (Regan Deposition). He recalls that, "when [he] raised it [disclosure] with Ingrid Falanga regarding the Protocol supplement, she readily agreed that this would be the time to do it, and we went to Debbie Diener, who was relatively new as Chief Counsel, but she readily said, yep, let's do it, let's fax it to Eleni [Constantine]." Id. at 193.[25] Mr. Regan could not recall, however, why this disclosure ultimately was not included in the Protocol. Id. at 197-198.

Regarding Ms. Falanga's assertion that they had discussed the disclosure for the Protocol, Ms. Constantine "d[id] not recall any discussion about the GAO documents in connection with the Protocol. I am certain however, that no one suggested to me that the GAO documents might be responsive in connection with preparation of the protocol — or at any other time until April 30." Ex. 3, at ¶ 52 (Constantine Declaration). Ms. Constantine also declared that Mr. Regan had said it was taking longer

[25] Mr. Regan stated that he subsequently uncovered some notes "that looked like an outline of what should be in the document production protocol. It was like four pages of notes in my handwriting, and at the end there's a reference to Hyattsville boxes, saying something to the effect to find out, you know, who had custody of these and talk to Pam [Locks] or something to that effect." Id. at 197.

than expected to locate and compile all these documents, but "I do not recall anyone raising any issue about the GAO documents during the preparation of the Protocol." Id. at ¶ 31.

As to Ms. Falanga's purported query prior to the DOJ conference call, Ms. Constantine again "ha[d] no recollection of that question from Ingrid and that answer," Ex. 11, at 168 (Constantine Deposition), nor did she have any recollection "of anyone bringing that issue up in connection with this pleading, nor do I have any recollection of disagreeing with that." Id. at 168-170. Ms. Constantine admitted thinking "that we should have put in there the destruction of the documents . . . Nobody brought it to my attention . . . But, nonetheless, this period of time I was the last person in Treasury to sign off on this document, and the buck stops here on that issue." Id.

Ms. McInerney testified that she "wasn't involved in the drafting" of the Protocol or the other pleadings, and so did not testify about this issue. Ex. 15, at 169 (McInerney Deposition). Mr. Wolin also was not involved with the drafting of these pleadings, and was unaware of this debate. Ex. 17, at 133 (Wolin Deposition).

b. The Supplement to the March 26, 1999 Protocol and Its Transformation into the Draft April 30, 1999 Letter From Rita Howard.

After Treasury submitted its Document Production Protocol, it was decided that the "Supplement" which was originally designated to accompany the protocol was to be transmitted in the form of a letter to go out on April 30, 1999 under the signature of Rita Howard, Project Manager, Treasury Document Production Protocol ("Draft Letter"). The April 30, 1999 letter was not actually sent to Plaintiffs and the Special Master until May 18, 1999. During the Special Master's May 17, 1999 site visit to FMS-Hyattsville, Ms. Howard stated that she had composed the Draft Letter notifying

DOJ of the document destruction, after being alerted by Mr. Regan that Indian records may have been in the destroyed boxes.[26]

The Draft Letter was addressed to plaintiffs' attorney Dennis Gingold. Attached to the letter were Enclosure A ("Survey of Treasury Functions/Processes and Associated Documents: Narrative Summary) (15 pages) and Enclosure B ("Types of Documents Potentially Relevant to Plaintiffs' Complaint Seeking a Proper Accounting of the IIM Deposit Fund Account 14X6039") (8 pages). See Ex. 34 (May 18, 1999 Letter from B. Ferrell to the Special Master, with attached draft April 30, 1999 Letter).

The key paragraph, for the purposes of this investigation, is at the top of page 5:

> Treasury had in its possession approximately 407 boxes of historical General Accounting Office (GAO) Form 5046 (Statement of Outstanding Checks) records which were submitted by all government disbursing officers to GAO, and a limited number of ledger books. The records generally are reports of requests to GAO to recredit the proceeds of the checks to the disbursing account. These records are undifferentiated by agency and date to the first half of the 20th century. These GAO documents were stored in a basement of FMS' Hyattsville facility and were not included on any FMS document retention schedule. In January 1999, janitorial contractors and/or clerical staff threw away approximately 262 [sic, read 162] of these boxes. When program management became aware of this destruction this activity was immediately stopped. FMS counsel immediately conducted a page by page search of the remaining 245 boxes with the assistance of program staff. No documents identifiable to the five named plaintiffs were found.

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[26] Although DOJ received a copy of the Draft Letter on April 30, 1999, the DOJ attorneys did not review it in detail until the following week, "and therefore did not learn of the existence of the boxes, until the evening of May 6, 1999." See Ex. 36, at n.1 (May 20, 1999 Letter from B. Ferrell to the Special Master).

On the last page of Enclosure B, under "GAO Historical Documents," reflecting GAO Form 5046, Statement of Outstanding Checks, the Hyattsville documents were described as follows: "245 boxes undifferentiated by agency. These documents date to the first half of the 20th century." The existence of a "Limited Number of Ledger Books" was also noted. [27]

Ms. Falanga testified that "when I got ready to leave the agency [in late April 1999], I forced the issue" of disclosing the Hyattsville document destruction to the court. She believed that her actions precipitated this disclosure, (Ex. 12, at 179-180 (Falanga Deposition)) and that by "raising it with Debbie [Diener] and then going back to Eleni [Constantine]," she ensured that "this information was going to be revealed, if you will, in the supplement to the Protocol, and in my mind, that was the last document where it could be revealed." Id.

Ms. Falanga testified that "she was increasingly uneasy. The further away we got from the original destruction, the harder it got to explain and the less likely we were to find an appropriate vehicle to put it in." Id. at 209. Furthermore, in her review, the Supplement itself was misleading, "as when I saw the Supplement and it was only an affirmative statement and it wasn't that they were actually destroyed, yeah, it was another finesse." Id. In short, Ms. Falanga believed that this was misleading to the Court. Id. at 210.

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[27] The final version of this letter was not sent by Ms. Howard to Mr. Ferrell until May 24, 1999. See Ex. 33 (R. Howard Letter to B. Ferrell, with Enclosure). The attached "Types of Documents Potentially Relevant to Plaintiffs' Complaint Seeking a Proper Accounting of the IIM Deposit Fund Account 14X6039" (8 pages) is similar to "Enclosure B" of the draft version, except for the deletion of the entry "GAO Historical Documents" from the final version. Also, the final version states that while these documents are "potentially relevant" they "are not responsive to Paragraph 19 . . . since they are not identifiable to any individual." This statement is new to the final version, and was not present in the original April 30, 1999 draft version.

Mr. Mazella declared that his "understanding from Mr. Regan and Ms. Falanga was that the existence of the Hyattsville boxes and their partial disposal (being categorized as potentially relevant to the litigation) would be disclosed to the Court and Special Master, the Plaintiffs and Justice in the April 30, 1999 submission." Ex. 7, at ¶ 24 (Mazella Declaration). He recalled that Ms. Falanga asked him to participate in a conference call with Mr. Regan and Ms. Constantine "concerning the reference to the Hyattsville boxes in the April 29, 1999 submission to the Special Master." Apparently, Ms. Falanga was concerned because Ms. Constantine, in an earlier telephone conversation with Mr. Regan, reportedly could not recall any discussions with FMS attorneys about the Hyattsville boxes. "I reminded Ms. Constantine of the phone call she and Ms. McInerney had with Ms. Falanga and myself on or around January 28, 1999, wherein Ms. Falanga and I first brought the issue to her and Ms. McInerney's attention. After I faxed [them] a copy of their handwritten revisions to Commissioner Gregg's February 1, 1999 memorandum, they both remembered the phone call . . ." Id. at ¶ 25.

Mr. Regan testified that "as I was preparing the Protocol Supplement I know that I drafted a blurb about the Hyattsville documents that I emailed to her [Ms. Howard] . . . So, she would have been aware of the blurb, the language of the blurb that ultimately got faxed to Justice on April 30th." Ex. 16, at 180 (Regan Deposition). Mr. Regan testified that the Protocol Supplement was to include "all documents FMS/Treasury has that are potentially relevant to the accounting issue" but that it "wasn't intended to include responsive documents." Id. at 200.

Mr. Regan declared that he met with Ms. Falanga on April 29, 1999, "and stated that I thought it would be appropriate to disclose the remaining and discarded Hyattsville documents in the Protocol Supplement. She agreed that this was appropriate . . ." Ex. 10, at ¶ 12 (Regan Declaration). Mr.

Regan and Ms. Falanga then met with Debra Diener, "who readily agreed that we should disclose the Hyattsville documents," and instructed Mr. Regan to fax the draft Protocol Supplement "including the explicit language referencing the Hyattsville documents to Ms. Constantine for review." Id.

Mr. Regan stated that, on April 30, 1999, "Ms. Constantine called me directly to give me her comments on the draft Protocol Supplement." Id. at ¶ 13. Mr. Regan asked Ms. Constantine about the Hyattsville documents; after she read his proposed language, "I said I thought they were potentially relevant because a small portion of the documents culled during the page by page search of the remaining documents referenced Native American field offices and Individual Indian Monies." Id.

Later that same day, Ms. Constantine called Mr. Regan in response to Ms. Falanga's voice-mail message "which explain[ed] that the Hyattsville documents were the same documents she had mentioned on other occasions," and Mr. Regan explained to her his recollection of the February 25, 1999 meeting. Id. at ¶ 14. According to Mr. Regan, Ms. Constantine replied, "She said ok and words to the effect that she had been so focused on the five named plaintiffs that she must have blocked it out." Id.

Ms. Constantine recalled that when she received the April 29, 1999 draft list of potentially relevant documents, she first discussed it with Mr. Regan, including the fact that it mentioned the Hyattsville documents. Ex. 3, at ¶ 36 (Constantine Declaration). Ms. Constantine asserted that "this was the first time I had ever seen a description of these documents in writing." Id. Concerned that they might be responsive Ms. Constantine asked Mr. Regan "many questions about the documents in an effort to find out what they were, and whether my concerns were well founded" id., and Ms. Constantine "told Mr. Regan that we could not file the list until we resolved whether these documents

were responsive and I asked him to send the draft immediately to [DOJ] so that we could discuss this issue and other problems with the document with them." Id.

Ms. Constantine declared that she "immediately reported to Ms. McInerney my concerns with the GAO documents. I said to her that it appeared that we had a significant problem regarding the destruction of records . . ." Id. at ¶ 38. Later this day, she "received a voice mail from Ingrid Falanga saying that she had heard that I was concerned about the GAO documents and that I should recall we had agreed to disclose them on the list of potentially relevant but not responsive documents." Id. at ¶ 40.

Ms. Constantine testified that as she and Mr. Regan began working their way through the draft of the April 30 letter, she came to the paragraph on page 5 about document destruction, and "[t]here was a discussion in the draft — there was a sentence in the draft paragraph that said something like: Although FMS counsel told program people not to destroy these documents, they did. And I didn't think that was a helpful sentence to have in this document. I mean, it may have been true, but why are we telling the Plaintiffs that? You know, you have to identify with your client vis-a-vis the Plaintiffs. . . . So we took that out." Ex. 11, at 185 (Constantine Deposition). As she kept reading this draft April 30 letter, "Ms. Constantine thought, well, this is really strange. These are not the type of documents that I thought they were. I was beginning to get alarmed at this . . ." so she asked Mr. Regan if they were relevant, "and he said, yes, I think they are relevant, and somebody who is doing an accounting might want to have these documents." Id. at 186. Ms. Constantine testified that she realized that if these were responsive documents, "we should make a separate disclosure immediately about these documents." Id. She immediately told Ms. McInerney, and said "Roberta, we have a big problem, we have these

potentially — we might have potentially responsive documents that have been destroyed, and we haven't told the court about them, and we need to tell the court right now." Id. at 187. Ms. Constantine also informed Ms. McInerney that she "was going to call the Justice Department and tell them that we had a big problem with this document, that we were going to sort it out as soon as possible, but we weren't going to file it today. And I did call Sandra Schraibman [DOJ] and told her that." Id. at 189.

Ms. Constantine testified that Mr. Regan "did not" tell her that they had pulled two boxes worth of documents, or that some of the files specifically referenced IIM accounts." Id. at 188. She further rejected Mr. Regan's contention that he had repeatedly specified that the documents were not responsive with regard to the five named plaintiffs: "[w]ell, that's not my recollection at all, and I really don't think that happened because . . . we just had a definition of what was responsive, and it includes anything identifiable with any individual. Plus, remember, the Judge has told us forget about the five named plaintiffs. You know, we reminded him [Mr. Regan] about the contempt order and the new focus of the case." Id. at 192.

Ms. McInerney declared that, after the February 25, 1999 meeting, the next "specific meeting" involving the Hyattsville documents occurred on April 30, 1999, Ex. 9, at ¶ 4 (McInerney Declaration.), when "Ms. Constantine came into my office visibly upset and agitated," and "indicated that we had a big problem with the April 30 expansive list of documents because . . . [the destroyed documents] may have contained documents that were potentially responsive to the Court's outstanding document production order." Id. Ms. McInerney recalled that she and Ms. Constantine discussed this and agreed that, at the time of the February 25 meeting, it was their understanding that the Hyattsville documents were not responsive. Id. Ms. McInerney speculated that "there probably was confusion and miscommunication

among the various lawyers" at this meeting, and she "suspected that the FMS lawyer [Mr. Regan] who told us the Hyattsville records were not responsive . . . probably was focusing on the five named plaintiffs, and not the predecessors in interest." Id. She believed that was the reason why "they did not give the correct answer to Mr. Wolin's questions." Ex. 15, at 165 (McInerney Deposition).

Ms. McInerney later "apologized to the Justice Department when we told them about this. I said I'm really sorry that we didn't tell you about this earlier. I had no idea that these documents were responsive. I thought they weren't even relevant, and that's why I didn't tell you." Id. at 179.

E Failure to Disclose in the April 12, 1999 "Response to Plaintiffs' Motion for Entry of a Proposed Order Regarding Document Production."

On March 25, 1999, Plaintiffs submitted to the Special Master their "Motion in Support of Document Protection Order." In the supporting memorandum, Plaintiffs argued that "[e]ntrance of the proposed order is imperative. Whether or not directives have gone out from the departmental level not to destroy documents, there is credible evidence that Indian trust documents have been lost or deliberately destroyed in Interior field offices, the Interior Solicitor's Office in Washington, D.C., and the Treasury Department . . ." (Memorandum, at 1).

Defendants filed their response on April 12, 1999. As with the previous pleadings, Ms. Falanga and Mr. Mazella were listed as "of counsel."

In the introductory section to their response, Defendants stated that "[t]he loss, or even the potential loss, of evidence during the pendency of a case is not a matter to be treated lightly. But merely alleging, without factual support, that 'there is credible evidence that Indian trust documents have been lost or deliberately destroyed' is not a sufficient basis to impose injunctive relief." (Response, at 2).

The section of this Response referring specifically to the Department of the Treasury began by rejecting Plaintiffs' assertions regarding certain deposition testimony, which does not pertain to this Report. The response then discussed the 1997 microfilm destruction and the subsequent efforts taken to preserve all microfilms and concluded by noting that the March 26, 1999 Protocol "sets out the actions Treasury is undertaking to provide Plaintiffs access to all documents which, while not responsive to any outstanding discovery request, may be potentially relevant to Plaintiffs' claims regarding a proper accounting of the IIM deposit fund account." (Response, at 14). This filing, too, made no mention of the Hyattsville documents or their destruction.

Mr. Regan declared that, around April 7 and 8, 1999, he was assigned to assist Mr. Mazella in the preparation of Treasury's response to Plaintiffs' request for an order regarding the documents, but since Mr. Mazella was ill, Mr. Regan assumed the primary role. Ex. 10, at ¶ 10 (Regan Declaration). Mr. Regan stated that "I went into [Ms.] Falanga's office and asked whether the Hyattsville documents should be mentioned in Treasury's draft portion of the reply. She told me that this filing was not the appropriate vehicle for raising the issue." Id.

F. Failure to Disclose in the May 3, 1999 "Defendant Secretary of the Treasury's Motion for Summary Judgment."

1. Treasury's Motion for Summary Judgment.

On May 3, 1999, Treasury filed its Motion for Summary Judgment on which Ms. Constantine and Gregory Till (Office of General Counsel, Treasury) were listed as "of counsel." In relevant part, the gravamen of this pleading was that Treasury's role in maintaining records and disbursing monies was, for

the most part, ministerial, and that principal responsibility for managing the IIM accounts rested with the Department of the Interior.

On page 31 of this Motion, Defendants asserted that: "Treasury previously has agreed to suspend the retention schedule and retain microfilm copies of checks during its participation in the litigation." Footnote 18 to this sentence stated, in its entirety, that, "[a]s this court is aware, in July 1997, Treasury discovered that approximately nine months of microfilm (January 1999 to September or October 1999) that was supposed to be preserved had inadvertently been destroyed. . . . At that time, Treasury undertook took steps to ensure that this did not recur" (internal citations omitted).

Again, the Hyattsville document destruction was not mentioned.

On June 7, 1999, the Court denied Treasury's motion for summary judgment. See Cobell III, 52 F. Supp. 2d at 32. The Court based its decision on the grounds that "Treasury generates trust documents that are highly relevant to an accounting of the IIM system and, therefore, highly relevant to this litigation," and that "Treasury has demonstrated a clear inability to retain these documents, at least for the purposes of this litigation." Id. at 33-34.

2. The Treasury Attorneys Prepare the Motion for Summary Judgment and the Footnote Regarding Disclosure.

The three attorneys principally involved with the drafting of Treasury's summary judgment motion were Ms. Constantine, Ms. Falanga and Mr. Mazella. The following discussion details the events surrounding their failure to include any mention of the Hyattsville documents in the drafting of this pleading.

Ms. Falanga recalled "rais[ing] the issue of the GAO boxes with Ms. Constantine because the Department of Justice wanted to include a footnote in the motion about the destruction of checks/microfilm which we had identified previously to the Court. Ms. Constantine did not want to include the issue of the GAO boxes in the footnote." Ex. 5, at ¶ 16 (Falanga Declaration). Ms. Falanga maintained that, "Mr. Regan and I immediately went to Ms. Debra Diener, the FMS Chief Counsel, and expressed our concern that Ms. Constantine had previously decided that we should inform the Special Master about the destroyed boxes . . . and now Ms. Constantine appeared not to remember the issue. Ms. Diener suggested that I call Ms. Constantine and explain that these were documents that we had discussed in January, 1999, and that she had decided to put the information in the supplement to the Protocol. I left Ms. Constantine a message to that effect. Mr. Regan subsequently informed me that Ms. Constantine had called him back and, according to Mr. Regan, she stated that she must be blocking an unpleasant memory." Id.

Mr. Mazella recalled "coming into Ms. Falanga's office during the weekend when the brief was being drafted, after a discussion among Mr. Till, Ms. Constantine, Ms. Falanga and Mr. Regan had apparently concluded. I recall that the result of the discussion among those individuals was that the footnote would not include a reference to the Hyattsville boxes." Ex. 7, at ¶ 26 (Mazella Declaration).[28]

[28] After his deposition, Mr. Mazella submitted a supplemental declaration to state that Paragraph 26 of his original declaration had been added after he read Mr. Regan's declaration. See Ex. 8, at ¶ 4 (Mazella Supplemental Declaration, Aug. 9, 1999).

Mr. Lewis testified that when Mr. Regan brought up the subject of disclosing the document destruction in the motion for summary judgment, Ms. Falanga said that Ms. Constantine "had said that that wasn't the proper vehicle" for such a disclosure. Ex. 13, at 160 (Lewis Deposition).

Mr. Regan declared that, at a meeting with Ms. Falanga, Messrs. Mazella, Lewis and Till, "I asked Ms. Falanga whether we should include a reference to the Hyattsville documents in the [summary judgment] motion since a footnote referenced remedial measures taken in the aftermath of the inadvertent destruction of microfilm checks." Ex. 10, at ¶ 15 (Regan Declaration). Mr. Regan stated that Ms. Diener then arrived and said that "this issue would be coordinated with Ms. Constantine." Id.

Mr. Regan recalled that later that afternoon, "Ms. Diener stopped in and advised me and Ms. Falanga that Ms. Constantine appreciated the comment on the Hyattsville documents but that she did not believe the Summary Judgment Motion was the appropriate place to mention the GAO records because they were not Treasury records and Treasury shouldn't have had them in the first place." Id.

Ms. Constantine "d[id] not recall any call with Mr. Regan or Ms. Falanga about the GAO documents in connection with the summary judgment motion." Ex. 3, at ¶ 53 (Constantine Declaration). In her deposition, Ms. Constantine reiterated "hav[ing] no recollection of any discussion about GAO boxes in connection with the footnote." Ex. 11, at 175-176 (Constantine Deposition). Regarding the discussion about the footnote, Ms. Constantine acknowledged that, "it is true that Justice wanted to include that footnote . . . When we got to the footnote, I said, you know, there's this footnote Justice wants — stuck this footnote in here about the destruction of the microfiche, I don't see why we have it in there. I took it out. I didn't see any point in the summary judgment motion of reiterating this particular

point." Id. at 176-177. "The GAO boxes didn't come up in our discussion" of this footnote. Id. at 177.

Ms. Constantine expressly rejected Mr. Regan's statement that she had told Regan that she must be blocking an unpleasant memory. Id. at 181.

Ms. Constantine declared that, late in the week of April 26, 1999, she and Ms. McInerney received from FMS counsel (including Ms. Falanga) "extensive comments . . . about the summary judgment memorandum; to the best of my recollection, none of these comments related to the GAO documents." Ex. 3, at ¶ 33 (Constantine Declaration).

G. Failure to Report to the Office of the Inspector General, Department of the Treasury.[29]

Mr. Lewis testified that, after Debra Diener became Chief Counsel (FMS), he "may have on a couple of occasions mentioned [to her] that . . . we probably needed to consider whether we needed to make a referral to Treasury's Inspector General." Mr. Lewis was unable, however, to recall Ms. Diener's response, if any. Ex. 13, at 154-156 (Lewis Deposition). Mr. Lewis testified that he knew that the Inspector General was charged with the responsibility "to investigate instances in which employees may have engaged in activity that was inconsistent with agency regulations or even law," and that he suspected some misconduct "with regard to the destruction of documents." Id. at 157.

[29] While a report to the Inspector General does not technically constitute a "disclosure" to the Court, it may be argued that prompt notification to the IG would have brought both Messrs. Knight and Wolin into the loop much sooner which, in turn, may have led to an earlier disclosure.

Mr. Wolin stated the Inspector General's office's "statutory mandate is to review [reports] of malfeasance." Ex. 17, at 103-104 (Wolin Deposition). As such, it would be acceptable to report a breach of ethical duties by an attorney directly to that office: "[a]nyone can report something. Anyone who thinks that there is malfeasance going on — I would say malfeasance would include willful neglect of a court order - that is appropriately reported to the Inspector General and there are hotlines for that and so forth." Id. at 105. However, Mr. Wolin testified that none of the Treasury attorneys reported any such ethical breach arising from this litigation: "[n]ot to my knowledge. And I suspect I would know about it if it were to have occurred." Id. at 105.

The Inspector General, in fact, was not notified during this time frame (from January 28, 1999 to May 11, 1999) about the document destruction and/or the delay in officially reporting the matter. The Treasury Department did not refer this matter to its Inspector General until June 11, 1999, one month after the disclosure of the document destruction. See Ex. 38 (Letter from R. Dodge (DOJ) to the Special Master).

VII Disclosure of the Hyattsville Document Destruction.

A. Treasury Attorneys Disclose the Destruction of the Hyattsville Documents to DOJ.

On May 6, 1999, the decision was finally made at Treasury to formally disclose the existence of the Hyattsville documents and their partial destruction.

Ms. Constantine declared that, on or after May 6, 1999, she spoke to Mr. Mazella about the GAO documents, and "I determined for the first time that these documents were potentially responsive because some of them could be identified to individuals." Ex. 3, at ¶ 42 (Constantine Declaration). Ms.

Constantine asserted, however, that Mr. Mazella incorrectly described the documents to her, as he "told me again that the documents were GAO records, not Treasury records, and said that they were never transmitted to any records custodian at Treasury." Id.

At this time, Ms. Constantine, Ms. McInerney and Messrs. Wolin and Knight "agreed that an immediate disclosure would be made." Id. Thus, DOJ submitted on behalf of Treasury the May 11, 1999 letter regarding the document destruction. Id.

Ms. Constantine testified that it wasn't "until after May 6th [1999]" that she learned that "the documents are not summary level accounting documents. They do reference individuals, and they belong to the Treasury Department." Ex. 11, at 94 (Constantine Deposition). Furthermore, "I don't believe I really understood the nature of the documents until I read the report that was filed on June 3rd. Because even on May 6th, they were represented to me as being GAO documents." Id. at 95.

Mr. Wolin testified that, not until May 7, 1999, did he learn that the destroyed documents may have been responsive, "when Eleni [Constantine] came to finally tell me that there were material in these boxes that were potentially responsive to the court's orders." Ex. 17, at 70 (Wolin Deposition).

B. DOJ Discloses the Destruction to the Special Master and to Plaintiffs.

On May 11, 1999, Phillip A. Brooks (DOJ/ENRD Senior Counsel) wrote to the Special Master (cc: Plaintiffs' counsel), informing them of the "loss of documents at the Department of Treasury." Mr. Brooks stated: "[w]e have not yet determined whether any of the lost documents are responsive to any outstanding document request, or even whether such documents are significant to this litigation." See Ex. 1, at 1 (Brooks letter to the Special Master). This letter stated that only "last Friday" did DOJ learn "that on January 27 [28] 1999, Treasury Department personnel stopped the destruction of an

undifferentiated document collection stored in the basement of the Hyattsville facility . . ." Id. This letter further explained that the remaining boxes were searched, and "approximately two boxes worth of Interior-related records were segregated from the remaining 245 boxes and have been set aside." Id. This letter also briefly mentioned the "missing box" from the move of records from FMS-Hyattsville to the Bureau of Public Debt (Parkersburg, West Virginia) in 1996. Id. at 2.

VIII Findings and Conclusions.

As articulated above, the events leading up to the destruction of the Hyattsville documents and the delays attendant to its ultimate disclosure can only be understood in the context of Treasury's role in the Cobell litigation. While the previous sections described the events which transpired between January 28, 1999 and May 11, 1999, this section will set out my findings as to why these events unfolded as they did. I find that Treasury's delay in informing the Court about the Hyattsville document destruction stemmed from a confluence of factors, including: (1) Treasury's failure to recognize the "significance" of the Cobell litigation; (2) Treasury's failure to keep itself informed of its obligations under the Court's orders; (3) the breakdown in communication between Treasury agencies and between Treasury and the DOJ; (4) a lack of accountability on the part of the individual attorneys; (5) the frequent turnover of FMS attorneys assigned to the Cobell litigation; and (6) the failure of the Treasury attorneys to comprehend their ethical obligations regarding Treasury's duty to disclose.

In my view, these deficiencies represented a disturbing trend to withhold information from the Court and a chronic need patently poor decisions instead of promptly acting to remedy them.

A. Treasury's Failure to Recognize the "Significance" of the *Cobell* Litigation.

1. The Weekly Reports.

Mr. Wolin explained that he, Mr. Knight, and the attorneys in the Office of the General Counsel were customarily advised of ongoing litigation within each of Treasury's divisions via a weekly report prepared by each of the six Assistant General Counsels. In addition to reporting on general activities, these weekly reports summarized the litigation activities of the respective offices. Ex. 17, at 9-11 (Wolin Dep.). Mr. Wolin testified that these weekly reports amounted to "about an inch thick of paper every

week." Id. at 10. Ms. McInerney testified that these weekly reports "contain literally a listing of sort of every single project or item that anybody has worked on, and that can include very small items or larger items." Ex. 15, at 7 (McInerney Dep.). Ms. Constantine testified that a typical weekly report would have "about 25 matters in our office [alone]. Then there is attached the weekly report [of the three Chief Counsels who report to Ms. McInerney]." Ex. 11, at 8 (Constantine Dep.).

According to Mr. Wolin, until "the very end of 1998 or the very beginning of 1999, I think it's accurate to say that the Cobell matter was mentioned quite episodically, but on page 3 or 4 of the FMS report, which was in turn attached to the Roberta McInerney's [weekly] report." Ex. 17, at 10-11 (Wolin Dep.). Mr. Wolin testified that he did not become aware of the Cobell litigation until sometime in 1997, "through reading one of these squibs in the infamous weekly report" – a delay which Mr. Wolin characterized as "disturbing" given the significance of this case and the Secretary's status as a defendant. Id. at 31-32. Nonetheless, Mr. Wolin thought, at that time, that this case was not as important for Treasury since it appeared to implicate the "purely ministerial" function of FMS. Id.

Ms. McInerney testified that "I was not made aware of the Cobell litigation until November of 1998, other than through the weekly reports that are filed every Friday. . . . I understand that the Cobell litigation was reported on the weekly reports, but I have gone back and looked at some of them. It was buried in the back along with a lot of other miscellaneous litigation." Ex. 15, at 7 (McInerney Dep.). Ms. McInerney testified that these weekly reports did not suffice to bring important matters to her attention: "if somebody just says, oh, it was in the weekly report, so that's why I didn't bring it to your attention. That's not acceptable and everybody knows that is not acceptable. . . . It's not sufficient for me to report it in the weekly report and say, oh, I did my job." Id. at 67.

Ms. Constantine testified that, although "there had been mention in the weekly reports of the [Cobell] case," it was not until November of 1998 that any of the FMS attorneys "had actually come over and spoken to us about the case." Ex. 11, at 48 (Constantine Dep.). Ms. Constantine testified that the weekly reports did not indicate to her the significance of this case: "I don't have a whole lot of recollection of them. They didn't seem to convey anything particularly alarming." Id. at 49.

Ms. Falanga testified that, prior to November of 1998, she did not know whether Mr. Ingold (then-Chief Counsel) had reported on Cobell to Main Treasury during their weekly meetings (as she only attended those meetings in Mr. Ingold's absence). She was aware, however, that FMS made "reports in our weekly [report] about our activities on the litigation." Ex. 12, at 67 (Falanga Dep.). Ms. Falanga specified that "we were reporting it in our weekly report to [Main] Treasury, the activities that were going on and the amount of time we were spending on it." Id. at 71.

Mr. Mazella testified that he first heard of the Cobell litigation sometime in 1996, since it "was discussed at a staff meeting and among the staff attorneys" of FMS and that Steve Laughton "reported regularly on the status of the case in a weekly report" which went up the hierarchy at Treasury. Ex. 14 at 20-22 (Mazella Dep.).

2. The Significance of *Cobell*.

Mr. Wolin testified that he and then-General Counsel Knight expected Treasury attorneys to be "fully engaged" in litigation involving the Department: "Our policy — Ed Knight used to have a phrase that we used to employ quite a lot, which is 'over-lawyering a case,' and I think it's fair to say that we consistently encouraged people to be more engaged, more involved, and certainly not less. . . . But it's

clearly from my perspective . . . not acceptable to not engage quite vigorously in litigation involving the Secretary like this." Ex. 17. at 47-48 (Wolin Dep.).

Mr. Wolin explained that, because Treasury is involved with thousands of cases every year, most cases were handled entirely at the level of one of the Chief Counsel's offices, and only a small number of cases were treated as "significant litigation" and brought to the attention of the General Counsel and the Deputy General Counsel. Id. at 7-8. Mr. Wolin described a General Counsel order "which sets forward a process by which significant litigation matters are meant to be reported up the chain and on a regular basis to the General Counsel." Id. at 13.

According to Mr. Mazella, the General Counsel Order referred to by Mr. Wolin, provides that "[w]here you have what's called significant litigation, then the pleadings have to be reviewed by normally either the Assistant General Counsel [Ms. McInerney] or her designee before things are filed." Ex. 14, at 31 (Mazella Dep.). Mr. Mazella stated that the decision to elevate a case to the level of significant litigation "is an agreement between the Assistant General Counsel and the Chief Counsel." He speculated that such a decision ultimately rests with "main Treasury" and not the Office of the Chief Counsel. Id. at 32-33.

Ms. Falanga defined significant litigation as "litigation that has potential[ly] precedential effects on all of Treasury or deals with a significant Treasury program that is of particular importance to the Administration." Ex. 12, at 11 (Falanga Dep.). She explained that "Treasury generally maintains a list of significant litigation that is reported all the way up the chain and has involvement from the General Counsel's office." Id. at 12. Ms. Falanga testified that, in November of 1998, she made the decision to elevate Cobell to the level of significant litigation. Id. at 69-72.

Besides Ms. Falanga, several of the Treasury attorneys testified as to their understanding that the Cobell litigation had reached the threshold of "significant litigation." Ms. McInerney testified that as "I've learned more and more about this case," she realized that "the case is a very, very significant case, clearly." Ex. 15, at 60 (McInerney Dep.). Mr. Mazella testified that "I would say it [Cobell] is now [i.e., as of his deposition on August 3, 1999]" significant litigation, and as of late November 1998, there was "an implicit understanding" that Cobell rose to the level of significant litigation. Ex. 14, at 36-38 (Mazella Dep.). Mr. Mazella "recall[ed] there is an e-mail or memo to the file by Mr. Laughton, which essentially says, '[b]y agreement between the then-Assistant General Counsel for Banking and Finance and the then-Chief Counsel of FMS, Cobell would not be treated as significant litigation. That was in 1996." Id. at 36.

B. Treasury's Failure to Keep Itself Informed of its Obligations under the Court's Orders

Several of the declarants testified that they were not aware of Treasury's discovery obligations under the Court's November 27 Order until much later, and that Treasury did not affirmatively attempt to obtain copies of the pleadings other than requesting the copies from DOJ.

1. The November 1996 Order.

For example, Mr. Mazella testified that he first became aware of this Order in "May of 1998, when the Court's scheduling order came out." Ex. 14 at 70 (Mazella Dep.). He then asked Andrew Eschen (DOJ) about the November 1996 Order and whether "it has anything to do with us?" Mr. Eschen replied, "No." Mr. Mazella testified that he thought this was not a lie, but was a misunderstanding by Mr. Eschen as to Treasury's burden of production. Id. at 102, 106-107. Mr.

Mazella testified that, although he had asked Mr. Eschen for a copy of the Order in May of 1998, he did not receive it until November 1998. Id. at 117; see also Ex. 3, at ¶ 8 (Constantine Decl.).

Although Mr. Mazella was aware of the Cobell litigation since 1996, and was assigned to it in March of 1998, he maintained that he was not informed, until "mid-June 1998, by Mr. Eschen of Justice that Treasury had a burden of production under paragraph 19 of the Court's November Order." Ex. 7, at ¶ 8 (Mazella Decl.); see also Ex. 14, at 73 (Mazella Dep.). Mr. Mazella declared that he then tried to get "identifying information" from the Department of the Interior "to locate and retrieve microfilm copies of negotiated checks and any other potentially responsive information identifiable to any of the five named plaintiffs or their predecessors in interest." Ex. 7, at ¶ 8 (Mazella Decl.). However, as of June 1998, Mr. Mazella recognized that it was too late to comply with the Court's Order, because "the deadline was June 30th [1998], and Mr. Christie [of Interior] had testified that he had not looked up any of the information, the financial transactions which would have enabled Treasury to search for the microfilm copies of checks. And so by the time I was aware of the burden of production, the deadline had essentially passed." Ex. 14, at 73 (Mazella Dep.).

Ms. Falanga testified that Mr. Mazella did not inform her of the Nov. 1996 Order until sometime in the fall of 1998: "I don't know the exact date but it was more towards November [1998] and not as early as March [1998]. . . . It may have been September, October [1998], I'm not sure when. Ex. 12, at 79 (Falanga Dep.). Ms. Falanga testified that when she first heard of Paragraph 19, she "thought we were in trouble. . . . Because the way I read Paragraph 19 it encompassed a requirement to produce a lot more than we had been asked to produce. We weren't just required to produce checks. We would basically be required to produce everything . . ." Id. at 79-80.

Ms. Falanga testified that she then attempted to inform the Treasury Office of General Counsel (Ms. McInerney and Ms. Constantine) about the November 1996 Order: "We tried to get on their calendar but our meeting was canceled. And, so, we were continuing to brief the issue up our chain of command and, like I say, we actually briefed Roberta and Eleni's client, the assistant [] fiscal secretary, Don Hammond." Id. at 81.

Ms. Constantine declared that she and Ms. McInerney met with Ms. Falanga and Mr. Mazella, in late November of 1998, and the latter two "explained that FMS counsel only learned that the [Nov. 1996] order applies to Treasury in May 1998, when Mr. Mazella heard about it at a status conference, and that despite repeated requests, ENRD [DOJ] did not provide FMS counsel a copy of the discovery order at issue until November 1998." Ex. 3, at ¶ 8 (Constantine Decl.).

Ms. McInerney testified that while Mr. Mazella and Ms. Falanga told her about Paragraph 19 of the Order in late November of 1998, she did actually not see this order until February of 1999. Ex. 15, at 83-84 (McInerney Dep.).

Ms. Falanga admitted that prior to the Nov. 28, 1998 meeting, Main Treasury was unaware of Paragraph 19 since she did not inform them directly, but had only told Mr. Ingold. Ex. 12, at 82, 84 (Falanga Dep.). She believed that Mr. Mazella had told Main Treasury, but admitted that her belief was only based on the fact that "he was coordinating all this." Id. at 85.

Mr. Mazella testified that "the first time we asked for a complete copy of all pleadings was at the time of the contempt trial," in January of 1999. Id. at 116. When questioned why FMS did not take the initiative to get their own copies of the pleadings, Ms. Falanga testified that it would not have made sense for Mr. Mazella to go to the courthouse to get a copy of the Nov. 1996 Order or the other pleadings,

"because Justice was representing us and they were supposed to provide us with the documents that we needed to respond to." Id. at 90 (Falanga Dep.). Ms. McInerney testified that Treasury was "usually provided with copies" of the pleadings and that it was unusual for this not to happen in this litigation. Ex. 15, at 48-49 (McInerney Dep.). Ms. McInerney further testified that she did not raise any questions as to why Treasury was not getting the pleadings upon their filing: "I didn't ask that question . . . at the time." Id. at 49. She "was told again by Mr. Mazella and Ms. Falanga that the Justice Department often did not notify Treasury of meetings, status conferences, many things. Did not send them copies of documents." Id. at 63.

Mr. Wolin testified that when Mr. Mazella had first learned the November 27 Order, "I think that he ought to have made it known to his supervisors. . . . Both the fact of [the Order] and the scope." Ex. 17, at 51-52 (Wolin Dep.). Mr. Wolin emphasized that FMS should have notified somebody at Main Treasury. Id. at 52-53. The decision by Mr. Mazella and the other FMS attorneys not to tell Main Treasury until late 1998 "was not a correct decision." Id. at 53.

Mr. Wolin emphasized that, "the minute that someone suggested in Judge Lamberth's court that there was a show-cause possibility that involved the Secretary of the Treasury, I would have wanted to known about that within the hour. . . . Well, it goes without saying that any proceeding in which the Secretary of the Treasury is potentially subject to a contempt order is something that we very much want to focus on with as much intensity as we can bring to bear." Id. at 53-54.

2. Paragraph 19 - Disjunctive or Conjunctive.

Testimony adduced during this investigation revealed conflicting understandings as to whether Paragraph 19 was to be interpreted conjunctively (i.e., the five named plaintiffs and their predecessors in interest) or disjunctively (either one but not both entities).

Ms. Constantine testified that while the FMS attorneys "were probably quite focused on the five named plaintiffs," she maintained a broader perspective, since "I really started from the contempt hearing, where the Court made quite clear that this disjunctive argument was a bunch of hooey, he didn't like it at all, and we had to focus on the predecessors in interest as well." Ex. 11, at 114 (Constantine Deposition).

Ms. Falanga testified, that at the time of the FMS attorneys' early February 1999 search through the Hyattsville documents, and dating back to the January 1999 contempt hearing, she understood that Paragraph 19 was to be read in the conjunctive, and she testified that this understanding was shared by the FMS attorneys. Ex. 12, at 121 (Falanga Deposition).[30]

Mr. Lewis testified that he knew, at the time of this court's discussion during the contempt hearing, that Paragraph 19 was not to be read as disjunctive, and he testified that he understood that this was known to the entire FMS trial team, since "that was the subject of discussion at the two meetings" on February 23 and 24, 1999. Ex. 13, at 113-114 (Lewis Deposition).

Ms. McInerney testified that none of the FMS attorneys, including Mr. Mazella or Ms. Falanga, told her that Paragraph 19 of this Order was phrased in the disjunctive, and she testified that she

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[30] On a related issue, Ms. Falanga testified that Treasury and DOJ differed in their interpretation of Paragraph 19 insofar as "Justice thought it only applied to checks and we thought it applied to everything." Ex. 12, at 80 (Falanga Dep.).

"absolutely" understood that the document request covered both the named Plaintiffs and their predecessors in interest. Ex. 15, at 86-89 (McInerney Deposition).

Mr. Mazella testified that he understood, while attending the January 1999 contempt hearing, that the court "made that quite clear" that Paragraph 19 was to be read as conjunctive, not disjunctive, and that this was also conveyed in the contempt opinion. Ex. 14, at 142-143 (Mazella Deposition).

Mr. Regan's testimony on this point lacks clarity, but it appears that his view is that when he formulated the search parameters for the February 1999 search through the remaining Hyattsville boxes, "the search parameters were designed to look for the five named plaintiffs." Ex. 16, at 171 (Regan Deposition). However, Mr. Regan also testified that "the search parameters were designed to be broader because we didn't have the names of the predecessors." Id. at 170. Mr. Regan asserted that his search design was acceptable at that time since the "contempt decision was not published until February 22nd . . . . At that point the court ruled that it wasn't the five named plaintiffs or [their] predecessors and [sic] interests, it was the five named plaintiffs and predecessors and [sic] interests that would constitute what would be responsive to paragraph 19." Id. at 169.

During the contempt hearing in January and in its February 22, 1999 opinion, this court unambiguously resolved this debate in favor of a conjunctive interpretation of Paragraph 19. Specifically, the Court noted that,"[t]he language of the November 27, 1996 Order is clear and reasonably specific. Even the Defendants admit that this language is 'facially plain.' . . . Of course, this concession merely reflects pride of authorship — the Defendants proposed, participated in the drafting of, and consented to this language themselves. . . . It is ironic, however, that the one thing the Defendants have done an

outstanding job on in the handling of this case — i.e., the drafting of paragraph 19 — is the very thing they seek to categorize as ambiguous." Cobell II, 37 F. Supp. 2d at 16-17.

This court specifically rejected the interpretation offered by Mr. Wiener during the November 23, 1998 status conference, crimped "as one def[ying] all logic." Id. at 17. Recognizing that "[t]his is certainly not the only instance of creative interpretation by the Defendants, but it is a telling example," id., the court therefore concluded, "paragraph 19 of the First Order of Production is clear and reasonably specific when viewed unambiguously. . . . the Defendants' unilateral misinterpretation cannot create an ambiguity when one does not exist." Id. at 18.

C. Breakdown in Communication Between Treasury Agencies and Between Treasury and the DOJ.

1. Strained Relations Between FMS and Main Treasury.

The lack of communication between FMS and Main Treasury can trace its roots to the historical tensions between the two organizations. Aside from the issues that led to the removal of Mr. Ingold by Main Treasury officials (detailed below), Mr. Lewis acknowledged that FMS' relationship with Ms. Constantine in particular "has been at time strained, dating back to prior issues, not this litigation." Ex. 13, at 195 (Lewis Dep.). Specifically, a "high-profile project" involving Secretary of the Treasury Rubin became "very contentious between senior people in [the FMS] office" which led to a "strained relationship with Eleni [Constantine]." Id. at 196.

Beyond any tensions caused by prior litigation, it bears note that, when Ms. Falanga, the then-Acting Chief Counsel (FMS) applied for promotion to be the Chief Counsel, she was turned down for

the position; and, on February 22, 1999, it was announced within Treasury that Debra Diener would be appointed to this position.

Ms. Falanga testified that, although she applied for this position, "I didn't want it, but I had to apply for it because I was actually performing that function even before the Chief Counsel [Mr. Ingold] left, and it just would have looked bizarre [not to have applied]. I also didn't want to work as somebody's deputy." Ex. 12, at 213 (Falanga Deposition). Ms. Falanga stated that she left Treasury, because "I was tired of Treasury. I was tired of the commute. There was no promotion potential. I had sort of exhausted that. I wanted to change . . ." Id. at 212. Ms. Falanga claimed that there was no animosity between Main Treasury and herself, since Ms. McInerney "was one of my references on my resume" although since she was also a panelist for this position, her name had to be removed from Ms. Falanga's resume. Id. at 214.

Mr. Mazella concurred that, although Ms. Falanga had applied for the job, she "had ambivalent feelings" about wanting it, so she was "not upset" about not getting it. Ex. 14, at 236-237 (Mazella Deposition).

According to Ms. Constantine, both she and Ms. McInerney recommended against Ms. Falanga's promotion. Ex. 11, at 206-207 (Constantine Deposition). Ms. McInerney noted that she had not recommended Ms. Falanga for the Chief Counsel position, and that by time of the February 25, 1999 meeting, Ms. Falanga knew that she wasn't going to get the job. Ex. 15, at 170-172 (McInerney Deposition).

2. Lack of Communication Between FMS and Main Treasury.

a. November 1998 Meetings.

Immediately following the November 23-24, 1998 status hearing before the Court, the attorneys from FMS and Main Treasury met to discuss the Cobell litigation. Although the exact dates of these meetings cannot be ascertained, the first meeting was attended by Ms. Constantine, Ms. Falanga, Mr. Mazella and Ms. McInerney. Ex. 3, at ¶ 8 (Constantine Decl.). Immediately thereafter, Ms. Constantine and Ms. McInerney met with Mr. Wolin to report what they had learned from Ms. Falanga and Mr. Mazella. Id. at ¶ 10; Ex. 12, at 109-110 (Falanga Dep.). The following day, Ms. Constantine, Ms. McInerney and Mr. Wolin met with Mr. Knight to discuss these issues. Ex. 3, at ¶ 11 (Constantine Decl.).

Ms. Constantine declared that the purpose of the meeting with Ms. Falanga and Mr. Mazella was for them "to brief us on the Cobell litigation. Although the litigation had been ongoing for two years at that point, this was the first time that FMS counsel had asked to meet with Main Treasury counsel [] about the case." Ex. 3, at ¶ 8 (Constantine Decl.). According to Ms. Constantine, "Ms. Falanga and Mr. Mazella informed us that the Court had set a contempt hearing . . . for failure to produce documents responsive to a court order in the case issued in November 1996." Id. "Ms. Falanga and Mr. Mazella informed us that they were very concerned about [DOJ ENRD's] representation of Treasury in this case. They stated that ENRD had not informed FMS counsel about the order when it was entered or for a year and a half thereafter." Id. Further, "[t]hey explained that FMS counsel only learned that the order applies to Treasury in May 1998, when Mr. Mazella heard about it at a status conference, and that despite repeated requests, ENRD did not provide FMS counsel a copy of the discovery order at

issue until November 1998." Id. Ms. Constantine recalled FMS counsel stating "that the discovery order at issue required the production of checks by Treasury and that Treasury had been unable to produce checks by the discovery deadline because it had not received from either DOJ or Interior the information necessary to locate the checks, which are not searchable by payee." Id. According to Ms. Constantine, Mr. Mazella and Ms. Falanga informed them that Treasury had no other responsive documents, since the "summary level accounting documents relating to the IIM deposit account . . . were by definition not responsive to the document production order at issue because they did not relate to any individual." Id. at ¶ 9.

Ms. Constantine testified she found the delay by the FMS attorneys in meeting with main Treasury counsel about Cobell to be "alarming," (Ex. 11, at 45 (Constantine Dep.)) "because at the time I heard about the case, the case was in bad shape, and one hopes to hear about these cases before they get to that point." Id. at 46. While "there had been mention in the weekly reports of the case, [ ] this was the first time that they [FMS attorneys] had actually come over and spoken to us about the case, and it was the first time that I became aware of this contempt hearing." Id. at 49. Ms. Constantine testified that she was "concerned that they — that Ingrid [Falanga] had not sought a meeting with us on this case earlier. I was concerned about that." Id. at 53.

As to Mr. Wolin's reaction upon learning of this news, Ms. Constantine testified: "[h]e was angry and upset that they [FMS attorneys] hadn't made us [Main Treasury] aware of these issues." Id. at 63.

Ms. Falanga testified that, prior to the late November 1998 meeting, the Office of General Counsel at Main Treasury (Ms. Constantine, Ms. McInerney and Mr. Wolin) was unaware of

Paragraph 19 in the Nov. 1996 Order. Ex. 12, at 82 (Falanga Dep.). However, Ms. Falanga maintained that Ms. Constantine erred by conflating two meetings that were actually several weeks apart. According to Ms. Falanga, at the first meeting, Ms. Falanga and Mr. Mazella informed Main Treasury of the upcoming contempt hearing and of the document production issues, id. at 92-93, while at the second meeting, they informed Main Treasury of their concerns about DOJ/ENRD's representation of Treasury. Id. at 86-89.

Ms. Falanga also took issue with Ms. Constantine's recollection that "Ms. McInerney and I [Ms. Constantine] had asked [the FMS attorneys] whether Treasury might have other responsive documents" [Ex. 3, at ¶ 9 (Constantine Decl.)]. Ex. 12, at 91-92 (Falanga Dep.). Ms. Falanga also did not recall either Ms. Constantine or Ms. McInerney asking them about Treasury's potential exposure to the discovery rules: "they weren't really asking, you know, okay, did you respond to all of discovery and questions of that nature." Id. at 93.

Mr. Mazella testified that, at the meeting in November 1998, Ms. Falanga and he told Ms. Constantine and Ms. McInerney that "we had an extant discovery request that we were past the deadline." Ex. 14, at 157 (Mazella Dep.). Mr. Mazella confirmed that he also told them that DOJ was not adequately representing the interests of Treasury and was not timely providing them with needed information. Id.

Mr. Mazella also disagreed with Ms. Constantine's recollection that FMS informed Main Treasury in November of 1998 about the show cause motion and the Court having set the contempt hearing, since the show cause motion was not filed and the court order issued until December of 1998. Id. at 163-164. Mr. Mazella similarly did not recall "Ms. McInerney and [Ms. Constantine] ask[ing]

whether Treasury might have other responsive documents" [Ex. 3, at ¶ 9 (Constantine Decl.)]. Ex. 14, at 167 (Mazella Dep.). Mr. Mazella testified that "I do know that there was a discussion . . . along the lines that the checks were the only things that, the only information that Ms. Falanga and I knew about at that time that might be responsive to the court's November [1996] order." Id. at 167-168. Mr. Mazella testified that "I don't remember" the statement, as described in Ms. Constantine's declaration [Ex. 3, at ¶ 9 (Constantine Decl.)], that the FMS attorneys told Main Treasury "that Treasury also had summary level accounting documents relating to the IIM deposit account but these, by definition, not responsive to the document production order at issue because they did not relate to any individual." Id. at 169.

Ms. McInerney testified that, at the late November 1998 meeting, Mr. Mazella and Ms. Falanga "explained the existence of this Cobell litigation, reminded [us] of the existence of it, and said that Judge Lamberth had scheduled a show cause hearing as to why the Secretaries of Interior and Treasury should not be held in contempt." Ex. 15, at 40 (McInerney Dep.). Ms. McInerney testified that her reaction was that "I was very unhappy" and that she told them "Well, [why] is this just being brought to my attention now? . . . . How could this have happened? What do you mean? You can't be serious." Id. Ms. McInerney recounted that Mr. Mazella and Ms. Falanga told them that DOJ didn't tell them of the November 27 Order until May or June of 1998, and that Mr. Mazella and Ms. Falanga then waited until November of 1998 to tell her of this Order. Id. at 41. Ms. McInerney testified that the FMS attorneys said that the November 27 Order "had been drafted with Interior counsel, Justice counsel and Plaintiffs' counsel, but Treasury was not at the table during the drafting," but that Treasury was still bound by the

order. Id. Ms. McInerney testified that she was concerned about the delay by FMS counsel in reporting the existence of this Order to her. Id. at 54-55 & 65.

Ms. McInerney could not corroborate Ms. Constantine's declaration [Ex. 3, at ¶ 9 (Constantine Decl.)] that "Ms. McInerney and I [Ms. Constantine] asked whether Treasury might have other responsive documents. We were told that checks were the only documents that Treasury had that could be identified to individual IIM money recipients and, therefore, might be responsive." Ex. 15, at 50 (McInerney Dep.). Ms. McInerney also could not recall "asking [whether Treasury might have other responsive documents] at that particular meeting." Id. at 51.

b. Messrs. Wolin and Knight are Belatedly Informed of the *Cobell* Litigation and Treasury's Obligations.

Immediately following the late November 1998 meeting with Ms. Falanga and Mr. Mazella, Ms. Constantine and Ms. McInerney met with Mr. Wolin to "to report to him what we had learned from Ms. Falanga and Mr. Mazella. We expressed serious concern that FMS counsel had not brought to our attention the serious problems in the case until this point. At a later meeting, Mr. Wolin expressed his strong displeasure to Ms. Falanga and Mr. Mazella in my presence." Ex. 3, at ¶ 10 (Constantine Decl.).

Ms. McInerney confirmed Ms. Constantine's declaration. Ex. 15, at 53-54 (McInerney Dep.). She recalled that Mr. Wolin "said something like, I can't believe we're just learning about this. How could this have happened?" Id. at 54.

Ms. Falanga admitted in her testimony that "Mr. Wolin started lecturing me again about not having raised this sooner and he had an open door policy and I should have come to him. I was in the

precarious situation where I had to clean up some of what was left behind by the former chief counsel [Mr. Ingold]. . . . I basically took over whatever the crisis was and dealt with that." Ex. 12, at 109-110 (Falanga Dep.). Ms. Falanga testified that, after she told Mr. Wolin "that I had brought it to his attention as soon as I could," he apologized. Id.

Mr. Wolin confirmed that this meeting was the first instance that he was made aware of the forthcoming contempt hearing in January of 1999 (Ex. 17, at 39-40 (Wolin Dep.)) and was "absolutely" the first occasion where he learned of the concerns shared by Ms. Falanga and Mr. Mazella about DOJ's representation of Treasury. Id. at 41.

According to Ms. Constantine, "Mr. Wolin, Ms. McInerney, and I met the next day with the General Counsel, Edward S. Knight, to advise him of the situation." Ex. 3, at ¶ 11 (Constantine Decl.). Mr. Wolin confirmed that this meeting occurred, and he believed that this was the first time that Mr. Knight had heard of the upcoming contempt hearing. Ex. 17, at 40 (Wolin Dep.).

Mr. Wolin testified that it was not until December 21, 1998 that he found out that the Cobell case "was anything other than the run-of-the-mill ministerial case," i.e., when Ms. Constantine told him about this Court's Order to show cause why Defendants should not be held in contempt, which was entered on December 18, 1998. Id. at 33 (Wolin Dep.). Mr. Wolin testified that he immediately informed Mr. Knight about the show-cause order and that the case involved individual Indian money accounts. Id. at 34. Mr. Wolin recalled that it was around this time that he first learned of the November 1996 discovery order. Id. at 42. He testified that this delay in reporting was problematic, since "a piece of litigation of this magnitude needed to have been made very clearly aware to the supervisor -- up the supervisory chain." Id. Even so, Mr. Wolin believed at the time that Treasury

"produced everything we could produce. . . . Again, in this end-of-December period, and through — through some weeks thereafter, I was told that we had produced the material that we could produce responsive to the court's [order]." Id. at 43.

As of late December 1998, Messrs. Wolin and Knight became "personally engaged and involved in the case" since it "was a case in which the Secretary was at risk, big case, enormously important equities, a very unhappy court." Id. at 75-76. Mr. Wolin recalled insisting to Mr. Mazella and Ms. Falanga that they were to report everything that occurred "to Main Treasury" and that he wanted to be timely appraised of "anything of substance" that arose. Id. at 60.

Ms. Constantine declared that, in late January of 1999, following the contempt hearing, Ms. McInerney and she met with Mr. Knight regarding document production and to discuss "our shared understanding that all responsive documents that could possible be identified had been disclosed to Plaintiffs" and nothing further could be produced without information from Interior to help identify other documents. Ex. 3, at ¶ 14 (Constantine Decl.). Ms. Constantine declared that Ms. McInerney and she then informed Ms. Falanga and her staff that they should search for further responsive documents, which "would be summary level accounting documents." Id.

Ms. Constantine stated that in December of 1998, she, Ms. McInerney, Ms. Falanga and Mr. Wolin met with DOJ/ENRD attorneys, including Lois Schiffer, the Assistant Attorney General, "to review our concerns about the case." Ex. 3, at ¶ 12 (Constantine Decl.). According to Ms.

Constantine, "Ms. Schiffer and other DOJ attorneys stated that such documents [summary level accounting records] were not responsive because they could not be identified to individuals." Id. [31]

c. Inadequate Intra-Agency and Inter-Agency Communication.

(1) The "Chain-of-Command" as a Barrier to Communication.

Mr. Wolin and several of the declarants testified that at Treasury, there was a "chain-of-command" by which matters would be reported upwards and orders would be promulgated downwards.

Notwithstanding the institutional necessity of reporting significant events linearly through the chain of command, (Ex. 17 at 8-13 (Wolin Dep.)), Mr. Wolin testified that this procedure could be bypassed, and that any Treasury staffer was welcome to come directly to his office to address any issue. He acknowledged that, while on other occasions FMS attorneys and staff had availed themselves of this open-door policy, it was never done in the context of the Cobell litigation. Id. at 21-24. Mr. Wolin further testified that he and Mr. Knight, the then-General Counsel, wanted to know about significant litigation on a timely basis, and that FMS had presented a problem in the past regarding their failure to promptly inform him and/or Mr. Knight about significant litigation. Id. at 15-17.[32]

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[31] It bears mention that, during the January 13, 1999 contempt hearing, Bradley Preber (of Arthur Andersen), a defense witness, testified on cross-examination that the Treasury checks would be responsive to paragraph 19 of the November 1996 order: "If it's related to the five named [Plaintiffs] and specifically relates to documents which may be held at Treasury, then I'd say, yes, that it does include Treasury documents." Ex. 32 at 588 (Transcript of Contempt Hearing).

[32] In that regard, Mr. Wolin and Ms. McInerney testified that the former Chief Counsel of FMS, Mr. Ingold, was a barrier to communications. As mentioned in the previous paragraphs, several of the FMS attorneys testified that they were unsure whether Mr. Ingold actually transmitted information to Main Treasury. Mr. Wolin testified Mr. Ingold "wasn't as interested in sharing with us

Mr. Wolin characterized the Cobell litigation as the largest "disconnect" he had encountered between FMS and Main Treasury. Id. at 20. He emphasized that if either Ms. Constantine or Ms. McInerney had improperly directed an FMS attorney not to disclose a sensitive matter, that attorney "could have come to me. Or they could have gone to [General Counsel] Knight. . . . it wasn't as though we were sitting up there on Mount Olympus unable to talk to anyone." Id. at 103. Mr. Wolin emphasized that "If they [FMS attorneys] view themselves as having been stymied in their attempt to pass it up the chain of command, there are multiple ways to get that information, to make that information known to the next, to the next level." Id. at 106.

Mr. Wolin insisted that the "weekly reports," while ostensibly facilitating communication up the chain-of-command, did not suffice to place Main Treasury on notice of the consequences the

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some of the operations of his office as we preferred, and ultimately it cost him his job." Ex. 17, at 26 (Wolin Dep.). Mr. Wolin perceived that the FMS staff under Mr. Ingold felt that they had to adhere to the formal hierarchy: "I do think that David Ingold ran an FMS Chief Counsel's office that was that sort of way. In fact, when I asked FMS lawyers to come to [Main] Treasury to brief me on various maters I had to tease out with an enormous amount of vigor the views of other FMS lawyers at the table because I think to some extent they were concerned that they might speak out of school in a way that Dave Ingold didn't appreciate." Id. at 100.

Ms. McInerney testified that Mr. Ingold's practice was to monopolize communications between FMS and Main Treasury: "He didn't like staff to say very much in meetings with me. He preferred to do the talking. So I had some concerns about the FMS Chief Counsel's Office." Ex. 15, at 39 (McInerney Dep.). Ms. McInerney elaborated upon the inadequate communication through the chain-of-command between FMS and Main Treasury: "I felt that sometimes things were reported to me that didn't need to be reported and them sometimes things that should have been reported weren't reported. I mean, I felt that they didn't appreciate, they didn't have a sense of priority always, and that I would have preferred more effective reporting." Id. at 38.

Ms. Falanga testified that "basically, he [Mr. Ingold] took a hands-off approach towards this case." Ex. 12, at 69 (Falanga Dep.).

Department faced in this litigation. He also asserted that he did not find credible the declarations of several of the FMS attorneys who had claimed that they could not go outside the chain-of-command to discuss discovery issues with DOJ, "because FMS lawyers were talking to the Justice lawyers all the time on a full range of issues in this case" and it was "certainly not the case that . . . every communication between FMS and Justice needed to be run through Main Treasury lawyers or that we were the only ones permitted to talk about certain subjects." Id. at 99-100 (Wolin Dep.). Mr. Wolin reiterated his doubts regarding the FMS attorneys' declarations on this point: "I don't find it particularly credible because they were talking to Justice about all kinds of things that we didn't." Id. at 101.

Mr. Lewis testified that the chain-of-command concerning the Cobell litigation consisted of Ms. Falanga on top, "then Dan Mazella, then basically everyone else would have been about the same, and it would have been myself and Susan Leiter." Ex. 13, at 116 (Lewis Dep.). Mr. Lewis testified that before the November 1998 contempt hearing, Ms. Constantine and Ms. McInerney "were not formally part of the litigation team but were being briefed regularly on the progress, and Eleni [Constantine] attended most, if not all, of the contempt hearing." Id. at 117. Mr. Lewis stated that, after the contempt hearing, Ms. Constantine "was now in charge of the litigation team, and the litigation team was expanded." Id. at 118. While Ms. Falanga initially determined whether documents were responsive or relevant, "once Eleni Constantine became involved, because of her position, she would have had ultimate responsibility for making that determination." Id. at 128-129. As to his own role within this chain-of-command, "[e]verything is very hierarchical, and I just did not consider even a possibility that I would go around my superiors. You just wouldn't go around your superiors and make a statement like that or I

wouldn't call Justice on something like that, independent of going up the chain. You just don't do it." Id. at 166.

Mr. Mazella testified that the chain-of-command between FMS and Main Treasury is a function of whether or not a case falls into the category of significant litigation. Ex. 14, at 31(Mazella Dep.). For ordinary cases, the Chief Counsel of FMS "is responsible for reviewing or approving pleadings," while for significant litigation, "then the pleadings have to be reviewed by normally either the Assistant General Counsel [Ms. McInerney] or her designee before things are filed." Id. Mr. Mazella testified that this chain-of-command also existed with regard to communications with DOJ: "in matters which would involve the department, then there would be that coordination with [Main Treasury] before communication [with DOJ] occurred." Id. at 32. Mr. Mazella believed that by reporting something to Main Treasury (Mr. Wolin, Ms. McInerney and/or Ms. Constantine), that sufficed to satisfy his obligations to report to the Court, "because of the hierarchy and chain-of-command." Id. at 43. Accordingly, when Mr. Mazella reported issues to then-Chief Counsel, Mr. Ingold, "I thought it was his responsibility to take whatever action was appropriate." Id. at 73. Mr. Mazella reiterated that it was the Chief Counsel "who was responsible for informing" Main Treasury of issues. Id. at 96. Although Mr. Mazella recalled that he informed Mr. Ingold about the destruction of the microfilms and the inability of FMS in June of 1998 to comply with the discovery order, he does not know whether Mr. Ingold actually notified Main Treasury. Id. at 55, 98-101. Mr. Mazella assumed that Mr. Wolin had been informed, in February of 1999, about the results of the review of the remaining Hyattsville boxes, since "I thought that was being raised through my chain of command through Ms. Falanga and Ms. Constantine." Id. at 228.

Mr. Regan testified that the chain-of-command within FMS for this litigation consisted of Ms. Falanga and her successor, Debra Diener on top, "Dan Mazella and Randy Lewis as senior attorneys," followed by several junior attorneys and Mr. Regan himself. Ex. 16, at 49-53 (Regan Dep.). Mr. Regan considered his disclosure obligation to be discharged since "whenever I had the chance to bring it up when I was working on different filings, I brought it up," and "every time I was working on something I'd bring it up, well, maybe we should do it then." Id. at 187, 189. Mr. Regan deferred to those higher up in the chain-of-command, since "the people that were making decisions about the case had a broader knowledge of the case than I did during that period of time, in early February [1999]," and they "had a broader — very broad understanding of strategy and whatever, and there might have been other reasons that I wasn't aware of or hadn't been privy to certain meetings." Id. at 190-191.

Ms. McInerney explained, pursuant to the chain-of-command, FMS attorneys with something significant to disclose to the court, such as document destruction, "would have gone through Main Treasury," since "their obligation would have been to tell us about it and then we would probably would have called Justice with them to tell them about this." Ex. 15, at 97-98 (McInerney Dep.).

Ms. Falanga testified that the chain-of-command between FMS and Main Treasury came into being when a case was elevated to the category of significant litigation "or if there's any other reason we think Treasury should be involved." Ex. 12, at 30 (Falanga Dep.). Ms. Falanga described the operation of the chain-of-command from her perspective as Deputy Chief Counsel when she was informed of the microfilm destruction in early 1998: "I informed the Chief Counsel [Mr. Ingold], who reported to Roberta McInerney and John Bowman." Id. at 31. Ms. Falanga was unsure, however, whether Mr. Ingold actually informed Main Treasury of this discovery, although "[i]t was my advice that he should. . .

. typically when something like that happened that had a potential consequence, it would be reported to [Main] Treasury." Id. [33]

(2) Mistrust Between Treasury and ENRD.

The investigation revealed a degree of tension between Treasury and DOJ which often delayed the timely communication of important issues. Specifically, several of the declarants harbored serious misgivings about being represented by DOJ/ ENRD.

Ms. McInerney testified that, as of late November 1998, "she was more concerned at that time about our representation from the Justice Department" than about the conduct of the FMS attorneys. Ex. 15, at 54-55 (McInerney Dep.). She recounted how, after the November 23-24, 1998 hearing, "we prepared internally talking points about representational issues we had with the Justice Department. And I know that Mr. Knight used those to talk to senior people about the Justice Department to express the concern that Treasury had about the fact that we really felt that the Justice Department had ignored Treasury in this litigation." Id. at 69. Ms. McInerney expanded upon this by discussing her perception of the views held by Messrs. Knight and Wolin, as of late 1998 onwards, that they "believed that we had not been adequately represented by the Justice Department and, in general, had gotten advice, very bad advice from the Justice Department on how to handle this litigation," although she also recognized that "we had some concerns about the FMS" as well. Id. at 120.

Ms. Constantine testified that, as of late November 1998, "the relationship with the Justice [attorneys] was a serious problem." Ex. 11, at 62 (Constantine Dep.). Ms. Constantine elaborated by

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[33] As the Court recognized, one "primary way that this entire process has been mishandled, [] is the total lack of coordination and oversight." Cobell II, 37 F. Supp. 2d at 30-31.

remarking that "I felt that, to the extent that the [DOJ] attorneys previously handling the case had not paid adequate attention to the Treasury Department, Justice was responding right away, they were adding these two new people, and that they were going to be sure that the Treasury Department issues were dealt with." Id. at 65. According to Ms. Constantine, as of late 1998, while "there may have been some fault with FMS, but that the main fault was over at DOJ, and we had to get better representation over there." Id. at 79.

Ms. Falanga recalled that, around November of 1998, she met with her senior (non-attorney) management at FMS, and "[w]e were pitching that we thought we needed different representation" from DOJ. Ex. 12, at 70 (Falanga Dep.). At the time of the November 23-24, 1998 status conference, Ms. Falanga recalled that "[w]e had a laundry list . . . [that] kept growing as to what Justice was doing in their representation. After the first incident or second incident I made it a policy that we generally did not speak to Justice unless there were two attorneys on the phone because they seemed to forget their promises and agreements." Id. at 73-74. Ms. Falanga claimed that when Mr. Mazella and she raised the representation issue with Mr. Wolin, after the November 23-24, 1998 hearing, that he read the transcript section pertaining to DOJ's statements about Treasury, "and he didn't think it was that bad and didn't think we needed different representation." Id. at 101-102. "Two weeks later, when the Judge announced that he was going to have a contempt hearing, then we were berated for not raising the [representation] issue sooner." Id. at 104. Ms. Falanga also testified that, after a meeting with Sandra Schraibman at DOJ (which occurred sometime after Feb. 25, 1999), her view of the relationship with DOJ was that "Justice is doing it again, they're expending all their time and energy on defending Interior, you know, and they have a long laundry list and they're forgetting about us again." Id. at 168.

Mr. Lewis confirmed the strained relationship between Treasury and DOJ, that while "no one told me that directly . . . . [i]t was a bad relationship." Ex. 13, at 208-209 (Lewis Dep.). Mr. Lewis perceived that "there was a strong sense on the part of Treasury that everything was being done [by DOJ] to put the best light on Interior, even if it hurt Treasury . . ." Id. at 224. For example, he recounted how DOJ tried to get FMS to certify the answers to over 500 requests for admissions with only a half-days' notice, and when Ms. Falanga protested to DOJ, shortly before midnight that day, that FMS did not have "the chance to review everything" and would miss the deadline, DOJ belatedly informed Ms. Falanga that DOJ had already requested and obtained an extension from the Plaintiffs without having notified FMS of this extension. In short, DOJ had the FMS attorneys work until midnight even though the Department of Justice knew that this was not necessary. Id. at 225-227.

Mr. Mazella testified that he became concerned about the possible conflict of interest in ENRD's representation of both the Treasury and the Interior Defendants. Ex. 14, at 68-69 (Mazella Dep.). Mr. Mazella stated that these two defendant agencies had divergent interests in this litigation and ENRD historically enjoyed a closer legal relationship with Interior than with Treasury. Id. From Mr. Mazella's perspective, Interior was not cooperating with Treasury's requests for information, and Andrew Eschen of ENRD was not helping Treasury with its attempts to get the required information from Interior. Id.

Mr. Regan recalled that, during the Feb. 23, 1999 meeting in Mr. Knight's office, "there was a great focus on what we considered representational issues with the Department of Justice, so there was an effort to document where we felt the Justice Department representation was less than Treasury would have liked and that this would be used to support Ed Knight's effort to have some representation from the Civil Division at Justice to take part in the litigation moving forward and not just the [ENRD] because

the Civil Division knew Treasury's programs better than the [ENRD] at Justice." Ex. 16, at 79 (Regan Dep.). Mr. Regan testified that the Feb. 24, 1999 meeting was a progress report "on producing this errata sheet which would set out the representational issues so that Mr. Knight could contact counterparts at Justice to request representation by the Civil Division." Id. at 80.

Mr. Wolin testified that, prior to late November 1998, he was unaware that FMS was concerned about Treasury's representation by ENRD. Although Mr. Wolin could not recall exactly when he was notified of their concerns, "it certainly came up in due course that there were concerns that FMS lawyers expressed about DOJ's representation, and to some extent, they continued to come up." Ex. 17, at 41 (Wolin Dep.).

D. Lack of Accountability by the Individual Attorneys.

On February 22, 1999, the court issued its contempt order against Secretaries Rubin and Babbitt and Assistant Secretary of the Interior Gover. Cobell II, 37 F. Supp. 2d 6, 9 (D.D.C. 1999). In so doing, the Court set forth the mechanism by which only these three individuals could be held in civil contempt. Id. at 8 & n.1. Initially, Plaintiffs' Consolidated Motion for Order to Show Cause why Defendants Should not be Held in Contempt and for Sanctions for Failure to Comply with Court Orders (December 9, 1988), "included as parties to the contempt trial Defendants and their employees responsible for this case, including their attorneys.'" Id. at n.1. However, on December 16, 1998, counsel for Defendants "filed a motion seeking to remove all names of Defendants' employees and agents, and to hold responsible only the 'Defendants,' which would include only the two Secretaries and the Assistant Secretary." This motion was granted. Id. This motion was signed solely by Susan Cook (DOJ/ENRD); no attorneys from either Treasury or Interior were listed. The rationale provided in this

motion for the change was that "Plaintiffs seek relief against Defendants as a whole and not against particular personalities, employees or attorneys." (Motion for Leave to File Alternative Form of Order, at 1).

This court recognized that "to the extent that Secretary Babbitt, Secretary Rubin, and Assistant Secretary Gover are the only parties to be held responsible by this court's order today, it is by their own choice, since they (through their counsel) consented to their agents and attorneys removing themselves from formal responsibility . . . . the court must assume that counsel had the permission of their three clients to ask the court to hold only the Defendants, and not their agents or attorneys, responsible for the failure to comply with this court's orders." Cobell II, 37 F. Supp. 2d at 8 n.1. This court concluded by stating that it "views it as unfortunate for Secretary Rubin that he has been tarnished with this contempt citation. What personal involvement he has had in this fiasco is unknown to the court, but what is clear is that he has totally delegated his responsibility to others and they have miserably failed to comply with this court's orders, as detailed in this opinion." Id. at 39.

Ms. McInerney testified that Mr. Knight and she "had not been aware either that the Justice Department had filed a motion on December 16th [1998] to remove from the defendant's side of the equation, employees and counsel I think it said, so leaving just the Secretary there, and when I saw the contempt order, I was extremely unhappy about that." Ex. 15, at 126 (McInerney Deposition). Ms. McInerney testified that Mr. Knight, upon seeing this footnote, "went ballistic and said, '[w]hat the heck is this? Who took [this decision]?' . . . We thought, oh my God, another effort by Justice to take themselves out of the limelight and hurt Treasury." Id. at 126-127. She stated that "Mr. Knight said, 'Did anybody know about this?,' and Eleni [Constantine] and I . . . we said we didn't know about it,

and I called FMS . . . called Ingrid [Falanga] and said did you know about this, you know, this motion, and Ingrid said, 'No, we didn't know about it.'" Id. at 127.

Ms. Constantine confirmed that "[t]his footnote caused the General Counsel to go totally ballistic when he read it, and he wanted to know who had consented to this order, and who had put the Secretary personally on the line, and why weren't the attorneys standing up and taking the fall." Ex. 11, at 127 (Constantine Deposition).

E. Frequent Turnover of FMS Attorneys Assigned to the *Cobell* Litigation.

To a lesser extent, the problems identified herein can be attributed to the frequent turnover, within FMS, of the attorneys assigned to this case. This turnover resulted in a lack of continuity and prevented the creation of an institutional memory necessary to prevent matters from being overlooked.

Specifically, from July of 1996 to September of 1997, Steve Laughton was, the FMS attorney principally responsible for this litigation. Ex. 13, at 48-49 (Lewis Dep.); see also Ex. 2, Attachment 00214-00215 (Laughton e-mails, July 10/15, 1996). Mr. Laughton was then transferred to a different project and the case was assigned to James Regan, another FMS staff attorney in early September of 1997. Ex. 16, at 43 (Regan Dep.). Mr. Regan testified that he only worked on this case for "basically the fall of '97 and a little bit in the winter," before being reassigned to regulatory work. Id.

In March of 1998, Ms. Falanga assigned Mr. Mazella as the third staff attorney principally working on the Cobell litigation, after David Ingold (then Chief Counsel, FMS) transferred Mr. Regan to "exclusively debt collection related work." Ex. 7, at ¶ 3 (Mazella Decl.). Mr. Mazella then had to come up to speed on this litigation: he declared that he then "familiarized myself with the memoranda and e-mails" to FMS Commissioners and their staffs "regarding FMS' promises to Plaintiffs, through Justice

and Congress, that it would preserve all records related to Treasury's Deposit Account No. 14X6039." Id. at ¶ 6. Mr. Mazella testified that he started attending the monthly status conferences. Ex. 14, at 71 (Mazella Dep.).

Mr. Wolin testified that, in or around December 28 or 29 of 1998, he "absolutely" realized that more direct oversight from main Treasury was needed over the Cobell litigation, and assigned Ms. Constantine to "be quite focused on this litigation" with Ms. McInerney also to become more involved. Ex. 17, at 58-59 (Wolin Dep.). Ms. Constantine's oversight role was corroborated by Mr. Mazella, who declared that "[b]eginning in December, 1998, Ms. Constantine took an active role in prosecuting the Cobell litigation." Ex. 7, at ¶ 2 (Mazella Decl.). Prior to this time, responsibility for this litigation remained within FMS, with no direct involvement by Main Treasury attorneys.

Mr. Lewis testified that he "was not formally brought into working on the litigation, until, I believe, December 22, 1998," although he had handled two phone calls in September or October of 1997, when Mr. Regan was the principal FMS attorney on this case. Ex. 13, at 47, 49 (Lewis Dep.).

Mr. Regan testified that Ms. Falanga reassigned him to this case on January 14, 1999, (Ex. 16, at 43 (Regan Dep.); see also Ex. 10, at ¶ 3 (Regan Decl.)), because of testimony during the contempt hearing about alleged document destruction at Treasury, and because there was a need for "surveying all documents we had and making sure we were on board and up to speed with everything FMS has in different record centers." Id. at 58. From that time through May 11, 1999, Mr. Regan testified that he spent "90 percent, 95 percent" of his time on this litigation. Id. at 54.

Ms. Falanga testified that she "was in charge" within FMS for the Cobell litigation. Ex. 12, at 19 (Falanga Dep.). As of early 1999, after the three aforementioned FMS staff attorneys were all assigned

to this litigation, Ms. Falanga testified that of the three, Mr. Mazella "was more or less the lead," while Mr. Lewis, with his accounting background "was more or less the lead for preparing the expert report," and Mr. Regan "was more junior, but he also had responsibilities." Id.

F. Failure to Comprehend Ethical Obligations under the Rules of Professional Responsibility and the Duty to Disclose Under the Federal Rules of Civil Procedure.

Treasury's failure to timely and accurately inform this Court and the Plaintiffs of the loss or destruction of documents that were responsive to Plaintiffs' document requests is the core of this Report. This section sets forth the Treasury attorneys' understanding and knowledge of their ethical obligations and their duty to disclose.

During their depositions, the six declarants all testified regarding (1) their understanding of their ethical obligations and their ongoing training, if any, in the field of professional responsibility;[34] (2) their

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[34] The Rules of Professional Conduct governing the conduct at issue in this report are as follows:

> Rule 3.3. Candor toward the tribunal.
> (a) A lawyer shall not knowingly:
> (1) Make a false statement of material fact or law to a tribunal;
> . . . .

D.C. Rules of Professional Conduct, Rule 3.3(a)(1) (1999).

> Rule 3.4. Fairness to opposing party and counsel.
> A lawyer shall not:
> (a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. . . .
>
> (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

knowledge of their obligations under the Federal Rules of Civil Procedure with regard to pre-trial discovery; and (3) their awareness of their disclosure obligations in light of the January, 1999 contempt hearing in this proceeding.[35]

Ms. Constantine testified that she only participates in the "required ethics training" that is government-wide and not attorney specific. Ex. 11, at 18-19 (Constantine Dep.). As a member of the District of Columbia bar, Ms. Constantine noted that she is not required to take any Continuing Legal Education ("CLE") courses, including those relevant to professional responsibility. Id. Notwithstanding her civil litigation experience prior to joining Treasury, she admitted that "I've actually never practiced as a litigator under the 1993 amendments" to the Federal Rules of Civil Procedure governing discovery production. Id. at 16. As to the ethical concerns raised by this litigation, Ms. Constantine testified that "the check destruction was a problem for me as well. I mean, I didn't understand why this hadn't yet been disclosed. . . . But it stuck in my mind that it hadn't been disclosed, and that these were, according

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. . . .

D.C. Rules of Professional Conduct, Rules 3.4(a), 3.4(d) (1999).

The U.S. District Court for the District of Columbia has adopted the Rules of Professional Conduct as adopted by the District of Columbia Court of Appeals. See Local Civil Rule 83.15(a), District Court for the District of Columbia (1999).

[35] Ms. Constantine and Mr. Regan are members of the District of Columbia bar; Ms. Falanga is a member of the Maryland bar, and Mr. Lewis is a member of the Texas bar, all of which have adopted the Rules of Professional Conduct. Mr. Mazella is a member of the Virginia bar, which currently follows the older Model Code of Professional Responsibility, although its provisions are similar (compare Disciplinary Rule 7-105 with Model Rule 3.3; and Disciplinary Rule 7-109(a) with Model Rule 3.4). The Virginia Supreme Court has adopted the Rules of Professional Conduct, effective January 1, 2000.

to them, potentially responsive documents, and therefore we had . . . a series of problems here . . ." Id. at 58-59.

Ms. Falanga testified that she is only required to take the "regular Government ethics training" for all government employees, since her Maryland bar does not require CLE or other ongoing professional responsibility courses. Ex. 12 at 8-9 (Falanga Dep.). She does admit, however to having a working knowledge of the Federal Rules of Civil Procedure, and has taken various DOJ courses on litigation topics which have updated her regarding changes to these Rules. Id. at 15. As to the ethical concerns raised by this litigation, Ms. Falanga testified that she recognized that the way in which the disclosure of the missing or destroyed documents was "getting very, very close . . . to violating my responsibility" as an attorney. Id. at 194-195. Ms. Falanga testified that, notwithstanding Ms. Constantine's reassurance that "I don't think that's a problem. We're all one government," Ms. Falanga was concerned that, after her departure, she would be blamed for these actions because her name was on the pleadings. Id. at 195-196.

Mr. Lewis admitted having little litigation experience, other than the present action: "it's the first time I've been in the courtroom." Ex. 13, at 4-8 (Lewis Dep.). Mr. Lewis testified that he has had no exposure to the Federal Rules of Civil Procedure, including the discovery rules, between law school (he graduated in 1991) and his involvement with Cobell. Id. at 5, 13-14. While he is required by the Texas bar to take 3 hours of CLE professional responsibility courses annually, he was unable to recall what courses he has taken to satisfy this requirement. Id. at 16-17.

Ms. McInerney testified that she has no prior trial experience, and that she has limited experience with discovery production. Ex. 15, at 26-30 (McInerney Dep.). Admitting no familiarity

with the Federal Rules of Civil Procedure governing discovery, Ms. McInerney testified that she is nonetheless familiar with the need to respond to discovery requests, and is "aware of the need to preserve documents, generally, and respond to discovery requests and be responsive." Id. at 31.

Mr. Mazella testified that, while he has had extensive litigation and discovery experience. Ex. 14, at 6-19 (Mazella Dep.)) the bulk of his experience has been in the arena of agency contract appeals and the Federal Rules of Civil Procedure prior to 1993. Id. at 11. As to the ethics training he receives -- both as a government attorney and as a member of the Virginia bar -- Mr. Mazella averred that he has a duty of candor: "if there are issues which for whatever reason, need to be raised to the Court or to opposing counsel, then each [agency] attorney has a duty to try to make sure that that happens." Id. at 27-29. As to the ethical concerns raised by this litigation, Mr. Mazella testified that he satisfied his obligations by reporting problems with the DOJ attorneys in litigating this case to Mr. Wolin, Ms. McInerney and Ms. Constantine. Id. at 42-44.

Prior to the Cobell litigation, Mr. Regan had no prior experience with document production. Ex. 16, at 12-15 (Regan Dep.). He has, however, attended and instructed general ethics classes for government employees. Id. at 20-21 & 27-28. Regarding the Federal Rules of Civil Procedure governing discovery, Mr. Regan admits to a "passing knowledge." Id. at 16.

Mr. Wolin testified that the Hyattsville document destruction should have been raised in the pleadings (prior to May of 1999): "[t]o the extent that anyone was aware that there was potentially responsive material in the boxes that were destroyed at Hyattsville, that absolutely needed to be made aware to the court in the context of pleadings that talked about document issues. . . . as I said before, my view is and, you know, the great lesson of Washington it seems to me is that when you learn of

something bad you disclose it to everyone immediately in a fully transparent manner. And that in my perspective is at Treasury we had nothing to hide on the underlying merits of this case. Nothing to hide in any of the documents we had." Ex. 17, at 93-94 (Wolin Deposition).

Mr. Wolin testified that he was skeptical that the FMS attorneys could not inform DOJ about the document destruction, "because FMS attorneys were talking to the Justice lawyers all the time on a full range of issues in this case." Id. at 99, 101.

Mr. Wolin testified that even if Ms. Constantine had told the FMS attorneys not to do anything about disclosing the documents, the FMS attorneys could have approached Ms. McInerney or Messrs. Wolin and/or Knight. Id. at 102-103.

According to Mr. Wolin "anyone who is in possession . . . has a belief that material has been destroyed that is potentially responsive to a court order has an obligation to pass it up the chain of command. If they view themselves as having been stymied in their attempt to pass it up the chain of command, there are multiple ways to get that information . . . to the next level." Id. at 106-107. In his view, it is "unacceptable to sit on information like that and have the result be that no one knows and no action is taken." Id.

CONCLUSION

From the inception of this litigation in June 1996, the Court has issued numerous orders and given countless directives to preserve and produce documents potentially relevant and/or responsive to this litigation. It was against the backdrop of these orders and the obligations they imposed on the parties, that, on January 28, 1999, Ms. Locks first discovered a file which referenced IIM and individual payees, realized that certain files related to this litigation may have been destroyed, and informed her agency counsel, Mr. Mazella. As of the time this destruction first came to light, every FMS attorney should have been on notice that the documents destroyed at the Hyattsville facility were potentially responsive or potentially relevant to the Cobell litigation.

However one reconciles the conflicting testimony of the declarants, my investigation revealed: (1) that Treasury failed to inform DOJ (and the Court) of the document destruction in a timely manner;[36] (2) that Treasury attorneys failed to keep themselves fully and timely informed of pleadings and court orders which directly affected their Secretary; (3) that FMS attorneys knowingly allowed the Deputy General Counsel to walk out of a meeting with the mistaken impression that none of the destroyed documents were potentially responsive and/or relevant; (4) that, despite FMS's abysmal record of reporting significant matters in a timely manner, Main Treasury did not insert itself into the Cobell litigation for more than two years and, once involved, did not actively oversee FMS' search of the documents (and their utilization of search criteria which can most charitably be described as comical); (5) that, prior to

[36] Concomitantly, it appeared that DOJ possessed no independent mechanism for verifying information given them by Treasury before making representations to the Court based upon that information.

this investigation, no one at Main Treasury bothered to review a single Hyattsville file, or insisted on receiving regular written updates concerning the status of the search, or cared to review the GAO Document Index – with its explicit references to Indian Agencies; (6) that representations were made to the Court which, at worst, were patently untrue, at best, were misleading insofar as they reported a false state of compliance or, at minimum, reflected a failure to diligently investigate and authenticate facts prior to certifying them to the Court as accurate; and (7) that the aforementioned events took place at the exact time the Secretary of the Treasury was held in contempt for violation of his discovery obligations.[37]

This is a system clearly out of control.

Had FMS counsel expended the same energy ensuring that DOJ, the Court, the Plaintiffs, and/or the Inspector General were notified of the document destruction as they spent shifting the blame to other agencies and to one another, the problems described above would not have reached the crescendo that they did and this investigation would not have been necessary. Had Main Treasury acted in accordance with its supervisory function and managed this litigation in a manner commensurate with its significance, again, this investigation would be superfluous. Unfortunately, those charged with supervising this litigation fell woefully short of their responsibilities. It can only be assumed that Treasury's indifference stemmed from the vain hope that it would be summarily dismissed from the case or that the Court would not find its Secretary in contempt. These assumptions were incorrect.

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[37] That Treasury chose not to disclose the destruction of the documents while the Court was contemplating whether to find the Secretary Rubin in contempt raises even more troubling inferences.

At a minimum, those attorneys who were aware of the Hyattsville document destruction from its inception and yet chose to take no action to ensure timely notification are guilty, in my view, of violating the Rules of Professional Conduct which demand candor to the Court and fairness to the plaintiffs and plaintiffs' counsel.[38] Notwithstanding declarants' self-serving iterations that the issue was never

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[38] The D.C. Circuit explicitly rejected the assertion by a federal agency attorney, in an appeal of an administrative decision, that agency attorneys were somehow held to lower ethical standards:

> The notion that government lawyers have obligations beyond those of private lawyers did not originate in oral argument in this case. A government lawyer 'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78, 88 (1935). The Supreme Court was speaking of government prosecutors in Berger, but no one, to our knowledge (at least prior to oral argument) has suggested that the principle does not apply with equal force to the government's civil lawyers.

Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1992). The D.C. Circuit noted that an Executive Order reiterated this higher standard for government attorneys: "The United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in federal court." Id. (citing Executive Order on Civil Justice Reform, 27 Weekly Comp. Pres. Doc. 1485 (Oct. 23, 1991)). Several older D.C. Circuit cases, arising under the Model Code, reflect this pattern of upholding government attorneys to a higher standard. See, e.g., Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) ("There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large."); Douglas v. Donovan, 704 F.2d 1276, 1279 (D.C. Cir. 1983) ("government attorneys, who have special responsibilities to both this court and the public at large")

Courts in other jurisdictions have similarly recognized the ethical obligations incumbent upon government attorneys. See, e.g., Williams v. Sullivan, 779 F. Supp. 471, 472 (W.D. Mo. 1991) ("It is the Court's view that there is a special duty imposed upon government lawyers to seek justice and to develop a full and fair record.); Pipkin v. City of Moore, 735 F. Supp. 1004, 1010 (W.D. Okla. 1990) ("Plaintiff has presented no authority excluding or exempting attorneys in public employment from the strictures of the Code of Professional Responsibility . . . and it is the view of this Court that it would be against public policy to set apart attorneys employed in public service from compliance therewith."),

"whether" to disclose the document destruction but "when," the question remains why, after repeated opportunities to do so, Treasury chose a squib on page five of a letter from Rita Howard to Plaintiffs' counsel as the mechanism for that disclosure.[39] What make these violations particularly egregious is that they were by no means isolated incidents in this litigation. Rather, they constituted part of a greater pattern of obfuscation that has permeated the Cobell litigation and has manifested itself on other occasions including: (1) the delayed disclosure of the destruction of the microfilm checks and the loss of the Bureau of Public Debt "missing box"; (2) the repeated misrepresentations that Treasury was in full compliance with Paragraph 19 of the November 1996 Order; (3) the ongoing objections to plaintiffs' requests for document preservation orders on the false premise that such steps were unnecessary; and

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aff'd 930 F.2d 34 (10th Cir. 1991) (table); Silverman v. Ehrlich Beer Corp., 687 F. Supp. 67, 69-70 (S.D.N.Y. 1987) ("First, an attorney in the employ of the government is not on the same footing as a private attorney. He or she has the August majesty of the sovereign behind his or her every utterance . . . . As a result, the attorney representing the government must be held to a higher standard than that of the ordinary lawyer."); Jones v. Heckler, 583 F. Supp. 1250, 1256 n.7 (N.D. Ill. 1984) ("counsel for the United States has a special responsibility to the justice system"); Zimmerman v. Schweiker, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983) ("As a United States Attorney General put it more than a hundred years ago, 'in the performance of [] his duty, [a government attorney] is not a counsel giving advice to the government as his client, but [is] a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligations.'") (citation omitted).

[39] Indeed, the record reveals at least twelve instances in which Treasury attorneys failed to disclose the destruction of the Hyattsville documents. These opportunities include: the February 25, 1999 meeting with DOJ; the February 16, 1999 status conference; the March 23, 1999 status conference; the April 13, 1999 motions hearing; the March 16, 1999 Motion to Strike plaintiffs' proposed document retention order; the March 19, 1999 Memorandum regarding plaintiffs' proposed document retention order; the March 26, 1999 Statement of Discovery Priorities and the Department of Treasury Cobell Litigation Document Production Protocol; the Supplement to the March 26, 1999 Protocol; the April 12, 1999 Response to plaintiffs' proposed order; and the May 3, 1999 Motion for Summary Judgment. In addition, Treasury attorneys could have availed themselves at any time, of contacting Messrs. Wolin and Knight, DOJ officials or the Office of the Inspector General.

(4) the silence during status conferences and pleadings when critical facts concerning Treasury's discovery responses and obligations were either omitted or misstated.

In light of the foregoing, I recommend that the Department of the Treasury and the Department of Justice be required to report to the Court all steps they have taken to ensure that these incidents will never be repeated. I further recommend that this Court take no action at this time until the Court can review what corrective and/or disciplinary measures have been taken to hold accountable those responsible for the conduct described above.

I do intend to allow the affected individuals the opportunity to address the finding contained in this Report, following which I will file a Supplemental Report in response.

Respectfully submitted,

DATE:_____ _____

Alan L. Balaran
SPECIAL MASTER